DOCKET

No. 08-1263
Title: Robert Wong, Warden, Petitioner
v.
Fernando Belmontes, Jr.
Docketed: April 14, 2009
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (01-99018)
Decision Date: June 13, 2008
Rehearing Denied: December 30, 2008

Date	Proceedings and Orders
Mar 30 2009	Petition for a writ of certiorari filed. (Response due May 14, 2009)
May 8 2009	Order extending time to file response to petition to and including June 15, 2009.
Jun 15 2009	Brief of respondent Fernando Belmontes, Jr. in opposition filed.
Jun 15 2009	Motion for leave to proceed in forma pauperis filed by respondent Fernando Belmontes, Jr.
Jun 25 2009	Reply of petitioner Robert L. Ayers, Warden filed.
Jul 1 2009	DISTRIBUTED for Conference of September 29, 2009.
Oct 5 2009	DISTRIBUTED for Conference of October 9, 2009.
Oct 13 2009	DISTRIBUTED for Conference of October 19, 2009.
Oct 26 2009	DISTRIBUTED for Conference of October 30, 2009.
Oct 26 2009	Record Requested .
Oct 28 2009	Record received from the U.S. Court of Appeals for the Ninth Circuit (1 box).
Oct 29 2009	Record received from the U.S. District Court for the Eastern District of California (7 boxes).
Nov 2 2009	DISTRIBUTED for Conference of November 6, 2009.
Nov 9 2009	DISTRIBUTED for Conference of November 13, 2009.
Nov 16 2009	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Nov 16 2009	The petition for a writ of certiorari is GRANTED. Judgment REVERSED and case REMANDED Justice Stevens concurring. Opinion per curiam. (Detached Opinion)

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PETITION FOR WRIT OF CERTIORARI

120 (1)
Supreme Court, U.S.
FILED
081263 MAR 30 2009
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

ROBERT L. AYERS, Warden for the California State Prison at San Quentin, *Petitioner,*

v.

FERNANDO BELMONTES, JR., *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Does the Sixth Amendment right to effective counsel in the penalty-phase of a capital trial require counsel to present and explain evidence in support of an alternative theory that is inconsistent with his client's testimony and that would likely open the door to previously excluded evidence that the defendant had personally committed another murder?

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Robert Wong, Warden, California State Prison at San Quentin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Ninth Circuit Court of Appeals following this Court's second remand is reported as Belmontes v. *Ayers*, 529 F.3d 834 (9th Cir. 2008) (*Belmontes III*). (App. 1a-115a.) The opinion of the Ninth Circuit following this Court's first remand is reported as *Belmontes* v. *Brown*, 414 F.3d 1094 (9th Cir. 2005) (*Belmontes II*). The initial opinion of the Ninth Circuit is reported as *Belmontes* v. *Woodford*, 350 F.3d 861 (9th Cir. 2003) (*Belmontes I*). The order of the district court is unreported. (App. 140a-191a.) The opinion of the Supreme Court of California in respondent's direct state-court appeal is reported at *People* v. *Belmontes*, 45 Cal.3d 744, 755 P.2d 310 (1988), *cert. denied*, 488 U.S. 1034 (1989). (App. 192a-285a.)

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment granting habeas corpus relief on June 13, 2008 and denied rehearing en banc on December 30, 2008. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment of the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

INTRODUCTION

In respondent Belmontes' 1982 capital trial for the murder of Steacy McConnell, defense counsel John Schick persuaded the trial judge to exclude evidence that Belmontes had committed yet another murder—the execution style shooting of Jerry Howard. Schick then presented a defense that portrayed respondent sympathetically without risking the benefit of the judge's evidentiary ruling. In 2008—after this Court twice had reversed Ninth Circuit judgments granting respondent habeas corpus relief on instructional-error grounds–the Ninth Circuit Court of Appeals again granted respondent relief from the death penalty. This time, in a 2-to-1 panel opinion, the court held that Schick had rendered ineffective assistance in failing to present penalty-phase evidence in support of an alternative theory, different from the one presented by defense counsel, that hardships in respondent's youth had psychologically led him to criminality. The panel majority dismissed the risk that presentation of such evidence would have re-opened the door to the damaging revelation that respondent earlier had murdered victim Howard. Further, it required counsel to present that additional defense theory despite the fact that it contradicted respondent's personal plea to the jurors that he did not want to treat his past as an excuse for his crime.

The opinions of the eight federal judges who dissented correctly rejected the panel majority's untenable application of this Court's "highly deferential" *Strickland* v. *Washington* test for ineffective counsel. As this Court recently confirmed in *Knowles* v. *Mirzayance*, No. 07-1315 (March 24, 2008), that deference precludes a federal court from requiring counsel "to raise every available non-frivolous defense" or to pursue evidence

"no matter how unlikely the effort would be to assist the defendant." Under *Strickland* and *Mirzayance*, the Sixth Amendment does not force defense counsel to present an alternative defense despite its predictable deleterious, if not explosive, impact on the defense case. Nor, under *Schriro* v. *Landrigan*, 550 U.S. 465 (2007), does the Constitution require counsel to do so where the evidence is inconsistent with his client's express wishes and testimony.

STATEMENT OF THE CASE

The Murder Of Steacy McConnell

On March 15, 1981, respondent Belmontes armed himself with a metal dumbbell bar and burglarized the home of 19-year-old Steacy McConnell in Victor, California. After entering the house and discovering Steacy at home, Belmontes savagely beat her with the metal bar, fracturing her skull with about 20 blows and causing approximately 15 gaping wounds to the side of her head. After delivering these blows, Belmontes stole Steacy's stereo equipment.

Belmontes explained to his two accomplices who had been waiting outside in a getaway car that he had to "take out a witness." Later that afternoon, Belmontes sold Steacy's stereo for $100, split the money with his accomplices, and used some of it to buy beer.

Meanwhile, Steacy's parents found their daughter lying unconscious in a pool of blood. Steacy died shortly

afterward from cerebral hemorrhaging caused by the blows to her head. (App. 195a-200a.)

The Trial and Appeal

A jury convicted Belmontes of first-degree murder. The jury also found true a statutory "special circumstance" requiring a sentence of death or life imprisonment without parole. See Cal. Penal Code, § 190.2(a). (App. 195a.)

For the penalty phase, the prosecution sought to introduce evidence of the facts underlying Belmontes'1979 conviction as an accessory to the voluntary manslaughter of Jerry Howard. Specifically, the prosecution was prepared to present evidence that Belmontes personally had committed the execution-style murder of the victim in that case. Defense counsel Schick, however, persuaded the court to disallow such evidence on the ground that the accessory conviction was res judicata. (App. 11a-12a.)

The prosecutor's penalty-phase case in aggravation–which included the circumstances of the charged crime –therefore was limited to five instances of Belmontes' other violent or criminal conduct: his theft of a handgun in early 1979; his carrying the gun during the same time period; the bare fact of his 1979 conviction as an accessory to manslaughter; his commission of aggravated assault and battery against his pregnant girlfriend the month preceding Steacy's murder; and an assault he committed while a ward in a county youth facility. The prosecution also presented aggravating evidence of autopsy photographs depicting the nature

and extent of Steacy' McConnell's fatal injuries. (App. 149a-151a.)

In mitigation, the defense presented "a substantial amount of evidence about [Belmontes'] difficult childhood." *Belmontes II*, 414 F.3d at 1134. This included evidence of Belmontes' impoverished, unstable, and abusive upbringing; his caring and wholesome relationships with a number of decent friends and family members; his good performance during a prior commitment to the California Youth Authority (CYA); and his participation in a church-related sponsorship program provided at CYA. This evidence was offered to show that Belmontes had maintained more good relationships with decent people, that he had undergone a legitimate religious conversion, and that he therefore was a "salvageable" person who would be able to assist other inmates if committed to prison for life. *Belmontes II*, 414 F.3d at 1134; *Belmontes I*, 350 F.3d at 901.

Belmontes also testified and addressed the jurors personally in allocution. Although he acknowledged the hardships of his childhood, he repeatedly implored them not to consider his background as an excuse. Counsel then made an "emotional closing argument." *Belmontes II*, 414 F.3d at 1140; *Belmontes I*, 350 F.3d at 907.

The jurors ultimately returned a verdict of death. (App. 195a.) The California Supreme Court unanimously affirmed the judgment. And this Court denied respondent's petition for certiorari. *Belmontes* v. *California*, 488 U.S. 1034 (1989). Subsequently, the California Supreme Court denied summarily denied respondent's habeas corpus petitions.

Federal Court Proceedings

In 1994, Belmontes filed a petition for writ of habeas corpus in the United States District Court for

the Eastern District of California. His overriding claim was that Schick incompetently had failed to present expert mental testimony in the penalty phase supporting various potential theories. The district court rejected these claims, finding that:

> [W]hile the aggravating evidence actually presented to the jury did not make this a clear-cut case for application of the death penalty, had Schick presented the evidence now offered by petitioner, the prosecutor would most likely have been permitted to rebut the evidence with damning evidence of prior violent acts. Competent counsel would not have done anything to jeopardize the successful exclusion of the [Howard] execution style killing, which would have been the most powerful imaginable aggravating evidence. Thus, the court finds no reasonable probability that, but for counsel's error, the result of the proceeding would have been different.

(App. 183a.)

On appeal to the Ninth Circuit, Belmontes' overriding claim still concerned Schick's "failure" to present an expert-opinion based defense theory. He distilled his ineffective-assistance claim to the following proposition: Schick should have presented experts (1) to explain the psychological significance of various events in Belmontes' background and upbringing and (2) to discuss Belmontes' future prospects for nonviolent institutional adjustment based on his earlier performance in CYA. The Ninth Circuit did not address this primary claim but instead order relief from the death-penalty judgment on a finding of jury-instruction

error. See 2002 WL 3457152 at *19-*51; 2002 WL 34357154 at *17-*19; *Belmontes I*, 350 F.3d 861.

This Court granted certiorari and remanded the case to the Ninth Circuit for further consideration in light of *Brown* v. *Payton*, 544 U.S. 133 (2005). *Brown* v. *Belmontes*, 544 U.S. 945 (2005). However, the Ninth Circuit again granted habeas corpus relief based on the same instructional error it had purported to find in its previous decision. *Belmontes II*, 414 F.3d 1094. This Court reversed on the instruction-error issue and remanded the case to the Ninth Circuit for further proceedings. *Ayers* v. *Belmontes*, 549 U.S. 7 (2006).

On remand, a divided panel again invalidated Belmontes' penalty judgment. Although the panel's prior opinions had characterized the defense case as "substantial," its new opinion now characterized the mitigation case as "insubstantial," "inadequate," and "minimal." (App. 24a, 65a.) Judge Reinhardt's opinion, joined by Judge Paez, held that Schick had rendered ineffective assistance by failing to present available lay witnesses to "humanize" Belmontes and by failing to "explain" the psychological "significance" or "effect" of the evidence actually presented. The opinion observed that a "lay juror" was not trained to understand the psychological and behavioral consequences of Belmontes' youthful experiences. On account of this—and despite characterizing it as an alternative ground for finding counsel's performance deficient on this point—the majority determined that counsel had culpably failed to present a "psychologist or a psychiatrist" to explain to the lay jurors how certain "traumas," such as evidence of a dysfunctional household and respondent's rheumatic fever, had exerted an adverse psychological effect that fundamentally changed respondent and ultimately led him to criminality.

The majority asserted that such evidence would not have "opened the door" to the previously-excluded evidence that Belmontes had also murdered Jerry Howard. Moreover, the majority discounted the potential prejudicial effect of the prior-murder evidence. According to the majority, "[t]he aggravating evidence, *even with the addition of evidence that Belmontes murdered Howard,* is not strong enough, in light of the mitigating evidence that could have been adduced, to rule out a sentence of life in prison." (App. 81a [emphasis added].)

In dissent, Judge O'Scannlain explained that none of the newfound evidence produced in federal court could have altered the outcome. First, under any analysis, Belmontes could not have been prejudiced because the additional evidence cited by the majority would have opened the door to devastating rebuttal evidence concerning Belmontes' criminal background—most importantly, the Howard murder. Second, the newfound evidence added very little to the defense evidence that already had been presented, and it still would have paled in comparison to the overwhelming case in aggravation, particularly the evidence of Belmontes' brutal murder of Staecy McConnell. Judge O'Scannlain questioned the "majority's analysis [that] assumes that the witnesses' testimony requires explanation" and warned that the majority "deprives the prejudice requirement of any meaning." (App. 90a.)

The Ninth Circuit denied rehearing en banc. (App. 116a-139a.) Eight judges dissented from the order denying rehearing. Judge Callahan issued an opinion reiterating the concerns expressed by Judge O'Scannlain and expressing her view that the majority's opinion would require a second penalty-phase trial in virtually all future capital cases. (App. 121a.) She praised Schick for the "minor legal miracle" of excluding the "damning"

evidence that Belmontes had murdered Jerry Howard. (App. 122a, 125a.) And she faulted the "majority's approach" for failing to recognize that the cited mitigation evidence was "unlikely to be meaningful to a jury without—as the majority puts it—'an expert who could make connections between the various themes in the mitigation case and *explain* to the jury how they could have contributed to Belmontes's involvement in criminal activity.'" (App. 129a [emphasis added]; see App. 37a.) But such expert testimony, Judge Callahan explained, would have resulted in the revelation of Belmontes's "execution-style" murder of victim Howard. (App. 129a.)

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT'S OPINION IMPOSES BURDENS ON DEFENSE COUNSEL THAT ARE IRRECONCILABLE WITH THE DEFERENTIAL REVIEW REQUIRED BY *STRICKLAND* AND THAT ANOMALOUSLY WILL FORCE DEFENSE LAWYERS TO PRODUCE EVIDENCE DAMAGING TO THEIR CLIENTS

A. Introduction

In upsetting the death judgment for the third time in Belmontes' case, the Ninth Circuit misinterpreted *Strickland* v. *Washington*, 466 U.S. 668 (1984), in a manner that threatens untoward consequences in countless future cases. The panel's decision neutralized the deference owed to counsel in his choice of defenses. See *Mirzayance* v. *Knowles*, 2009 WL 746274, at * 10; *Strickland*, 466 U.S. at 690-691. And it ignored the respect counsel should pay to his client's wishes when deciding how best to proceed. See *Schriro* v. *Landrigan*, 127 S.Ct. at 1941; *Strickland*, at 690. Most important, the panel's decision flouted the principle that counsel may not be faulted for failing to pursue evidence that

threatens to prove harmful to the defense. See *Wiggins* v. *Smith*, 539 U.S. 510, 535 (2003); *Strickland*, at 699. The harmful effect of the Ninth Circuit's decision threatens to be profound. Indeed, as expressed in Judge Callahan's dissenting opinion, eight judges of the Ninth Circuit fear that the panel majority's decision "has created a standard for effective assistance of counsel in death penalty cases that, in effect, guarantees a defendant a second penalty stage trial." (App. 121a.)

B. Under The *Strickland* Standard, it is Not Ineffective Assistance of Counsel When a Defense Lawyer Does not Present Evidence That May Open the Door to Damaging Rebuttal and That Conflicts with the Express Pleas and Testimony of the Defendant

As this Court has noted "'[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel.' Rather, courts must 'judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct,' and '[j]udicial scrutiny of counsel's performance must be highly deferential.'" *Roe* v. *Flores-Ortega*, 528 U.S. 470, 477 (2000) (quoting *Strickland*, 466 U.S. at 688-690.)

It is also settled that a decision not to investigate or present a particular line of evidence cannot be challenged where counsel could "reasonably surmise" that such evidence "would be of little help," *Wiggins* v. *Smith*, 539 U.S. at 525 (quoting *Burger* v. *Kemp*, 483 U.S. 776, 794 (1987)), or might be harmful. *Id.* (quoting *Darden* v. *Wainwright*, 477 U.S. 168, 186 (1986)). As this Court very recently confirmed, "*Strickland* does not require

counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant . . ." *Knowles* v. *Mirzayance*, 2009 WL 746274, at * 10.

The "highly deferential" *Strickland* inquiry also requires a defendant to affirmatively establish prejudice from his attorney's alleged shortcomings. *Strickland,* 466 U.S. at 692. In this respect, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* at 694.

Strickland does not require all reasonable lawyers to present an alternative defense that poses the obvious threat of backfiring and undermining the defendant's own statements to the jury. Here, Schick understood that a successful resolution of Belmontes' penalty-phase trial required him to preempt the centerpiece of the prosecution's intended case in aggravation: that Belmontes earlier had committed an execution-style murder of Jerry Howard, shooting him in the back of the head. The prosecution was prepared to present eyewitness testimony, and also testimony that Belmontes had confessed to the killing after being committed to CYA for the accessory offense. (App. 92a-93a.)

Schick accomplished the "minor legal miracle of persuading the judge to suppress this evidence on the ground that the accessory conviction was res judicata. (App. 125a.) Schick reasonably chose to proceed cautiously to protect his remarkable victory. He realized that opinion testimony about Belmontes' character would likely lead to impeachment regarding the details of his prior acts of violence, including the Howard murder, and that it likely would open the door to rebuttal evidence

regarding these acts. Understandably, it was Schick's strategy to avoid jeopardizing the court's earlier favorable ruling by opening the door to such evidence. (App. 93a.)

The Ninth Circuit, however, treats the Sixth Amendment right-to-counsel guarantee as requiring defense lawyers in Schick's position to run that risk. Although the majority attempted "to avoid the minefield of Belmontes' criminal history" (App. 94a) by purporting to find multiple independent grounds for prejudice, its finding of ineffective assistance logically and inexorably reduces to a single criticism—that Schick incompetently and prejudicially failed to present an alternative defense theme that, the majority believed, could have been supported by available evidence to explain the effects and significance of Belmontes' life experiences. The opinion stressed that Schick should have presented mental-health expert evidence—or somehow should have employed his closing argument as a non-expert substitute for that psychiatric opinion—to explain to "[un]trained" lay jurors how hardships of Belmontes' upbringing resulted in a depressing isolation that changed him from a well-adjusted adolescent to a drug user and criminal. (App. 50a-51a, 55a, 62a-66a, 81a.)

Expert opinion evidence, however, risked informing the jury of Belmontes' prior murder of Jerry Howard.[1/] At the

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1. The majority insisted that petitioner's sole contention on appeal about expert testimony opening the door to the Howard murder concerned impeachment of experts regarding Belmontes' prospects for institutional adjustment; the majority finds that petitioner had waived any claim concerning the use of expert testimony for other reasons. (App. 69a-70a, n.20.) That is incorrect. Petitioner argued that *any expert evidence about Belmontes' character* would have opened the door to the facts of the Howard murder. To the extent petitioner did not *specifically argue* that expert opinion about the hardships of Belmontes' childhood leading to drug abuse and crime

very least, as Judge O'Scannlain noted in dissent, such questioning certainly would have been permitted under California law because it obviously would have been relevant to the weight and credibility of any opinion regarding Belmontes' character development. See Cal. Evid. Code § 721(a). The evidence could also have been admissible as rebuttal. *Id.* § 1102(b); *People* v. *Boyd*, 38 Cal.3d 762, 775, 700 P.2d 782 (1985); *People* v. *Alfaro*, 41 Cal.4th 1277, 1323-26, 163 P.3d 118 (2007); *In re Andrews*, 28 Cal.4th 1234, 1251, 52 P.3d 656 (2002); *People* v. *Hendricks*, 44 Cal.3d 635, 642, 749 P.2d 836 (1988). Equally if not more predictable, producing such defense testimony would have been tantamount to misusing the judge's earlier "res judicata" ruling as a sword rather than a shield and thus would have risked re-opening the ruling in light of the new circumstances. This risk would have been especially dangerous, for the judge's ruling was clearly erroneous under California law. See *People* v. *Koontz*, 27 Cal.4th 1041, 1087, 46 P.3d 335, 365 (2002); *People* v. *Bradford*, 15 Cal.4th 1229, 1375, 939 P.3d 259, 347 (1997). Indeed, Schick was constrained to withdraw a character-related question to a witness because the trial judge ruled that it would "open the door" to evidence of the Howard murder. (App. 92a-93a.)

Belmontes instead might argue—as the Ninth Circuit inconsistently ruled—that Schick himself should have taken on the job of explaining, in the guise of argument to the jury, the psychological impact Belmontes' hardships might have worked on his development as an adult. Absent a need to cross-examine an expert about the basis

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would have exposed the facts of the Howard murder, petitioner cannot be faulted. Petitioner had no opportunity or reason to address this particular argument previously because it was not raised in Belmontes' briefs but instead appeared for the first time in the majority's opinion.

for his opinion, respondent might argue, Schick in this way still might have "synthesized" the psychological evidence while avoiding "opening the door" to the prior-murder information. But a defense lawyer cannot be charged with the task of testifying as a psychiatric expert; indeed, the premise of the Ninth Circuit's own ineffective-counsel analysis is that lay persons, such as jurors, need a psychiatrist or psychologist to explain such things to them. (App. 67a-69a.) Without expert testimony, Schick would have been unable to provide any evidentiary support as to how or why any of the events of Belmontes' background had caused him to use illicit drugs or to become the remorseless criminal who brutally murdered Steacy McConnell.

Counsel, in any event, can hardly be condemned as unconstitutionally ineffective for refraining from offering pseudo-psychiatric opinion testimony in the form of un-cross-examined closing argument.[2] As Judge Callahan observed, the logic of the majority's reasoning is that Belmontes' "traumatic experiences would not have been meaningful to a jury without the use of expert witnesses (who would have had to have been informed of the Howard murder." (App. 134a-135a.)

Moreover, even if Schick did not employ experts but instead attempted to substantiate such a theory based solely on lay opinion testimony about Belmontes' character, he still would have faced the serious risk of

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2. The Ninth Circuit explained that its cases make clear that counsel has a duty to "explain" the significance of mitigating evidence. (App. 24a-25a, n.3, citing *Mayfield* v. *Woodford*, 270 F.3d 915, 928 (9th Cir. 2001)). This "duty" is traceable to a single conclusory sentence at the end of the plurality opinion in *Williams* v. *Taylor*, 529 U.S. 362, 366 (2000) (Stevens, J.). As Judge O'Scannlain pointed out, the majority "erroneously assumes that the witnesses' testimony required explanation." (App. 114a.)

upsetting the judge's prior ruling regarding the Howard murder. The record demonstrates this. During the penalty phase trial, Schick inadvertently asked a defense witness whether Belmontes was a violent person. During an in limine hearing, the prosecutor argued that such questioning about Belmontes' character would open the door to cross-examination on Belmontes' responsibility for the Howard murder. The judge agreed that such questions by the defense would allow the prosecution to "go into the whole background." Schick was allowed to withdraw the question. (App. 92a-93a.) There is little doubt that any lay opinion testimony, aimed at showing how illness or isolation somehow transformed Belmontes from being a good kid into a drug-abusing, violent criminal, also would have opened the door to cross-examination about Belmontes' violent past, including the Howard murder.

As thoroughly set forth in the dissenting opinions of Judges O'Scannlain and Callahan, Schick was aware of virtually all of the additional potential evidence of Belmontes' hardships as a youth that was cited in the majority opinion. It was reasonable for him to conclude that this additional evidence was unlikely to persuade the jury. See *Mirzayance*, 2009 WL 746274, at *10. More important, much of the additional evidence likely would have led to aggravating rebuttal evidence about Belmontes' background and character. The Ninth Circuit panel failed to recognize Schick's grave concerns over doing anything to jeopardize the court's ruling to exclude evidence of the Howard murder. In this respect, the majority ignored the well-established principle that the relevant inquiry under *Strickland* is not what defense counsel might have pursued, but whether his choices were

reasonable under the circumstances. *Strickland*, 466 U.S. at 691.

In addition, as Judge Callahan further explained, presenting evidence in support of the alternative defense theory proffered by the panel majority would have conflicted with Belmontes' repeated personal pleas to the jury not to use his background as an excuse or "crutch." (App. 136a-147a; see also *People* v. *Belmontes*, 45 Cal.3d at 798-99; *Belmontes I*, 350 F.3d at 901; *Belmontes II*, 414 F.3d at 1134.) Presenting a theme that Belmontes should be pitied because illness and isolation led him to a life of drugs and crime would have constituted precisely the type of excuse that Belmontes personally had implored the jurors not to consider. The panel majority's ruling that Schick should have presented the defense violated *Strickland's* admonition that counsel in capital cases should consider their client's input on how to proceed and to avoid damaging their relationship. *Strickland*, at 690; see *Schriro* v. *Landrigan*, 550 U.S. 465, 127 S.Ct 1933, 1941 (2007); *Florida v. Nixon*, 543 U.S. 175, 187 (2004).[3]

Schick's performance at the penalty phase proves reasonable under *Strickland* because it preserved the benefit of the judge's pre-trial ruling and kept hidden from the jury the sordid facts of Belmontes' other murder and his drug-related misconduct. See *Darden* v. *Wainwright*, 477 U.S. at 186; *Burger* v. *Kemp*, 483 U.S. 776, 792 (1987); *Strickland*, 466 U.S. at 699, see also *Wiggins*, 539 U.S. 526; cf. *Rompilla* v. *Beard*, 545 U.S.

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3. The Ninth Circuit had implicitly recognized the neutralizing tension between Schick's "substantial evidence" of Belmontes' "difficult childhood" and Belmontes' repeated avowals that he did not want to use his "rough childhood 'as a crutch' or excuse." *Belmontes I*, 350 F.3d at 901; *Belmontes II*, 414 F.3d at 1134. The majority did not acknowledge this tension in its latest opinion.

374, 383 (2005). It also proves reasonable because it avoided contradicting his client's own testimony and pleas to the sentencing jury.

Schick's performance, finally, may not be condemned as ineffective because it manifestly did not cause Belmontes probable prejudice. If Schick had presented the evidence cited by the Ninth Circuit panel, it is reasonably probable, to say the least, that the damaging prior-murder information then would have been placed before the jury too. The additional aggravating evidence of Belmontes' prior criminality—including but not limited to the revelation of his personal responsibility for the Howard murder—would have overwhelmed whatever negligible mitigation might have been gleaned from the alternative defense theme propounded by the Ninth Circuit panel. [4]

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4. Suggesting that evidence of the Howard murder might not have been particularly damaging, the majority cited several cases where defense counsel's ineffectiveness was found to be prejudicial, despite the fact that the defendant had committed multiple murders. (App. 81a-82a.) This comparison is fallacious. The majority's cited cases all address instances where the jury was given all of the evidence of the defendant's prior crimes and weighed that aggravating evidence against the mitigating evidence that was offered at trial. In this case, the jury found that the death penalty was the appropriate punishment without ever hearing anything about Belmontes' execution-style murder of Jerry Howard. Moreover, the Howard case established that Belmontes was not just a multiple murderer, but a recidivist murderer. Accordingly, the question here is whether the evidence and argument supporting the majority's newfound theme could have been sufficient by itself, not only to overcome the aggravating evidence actually presented, but also to overcome the additional aggravating effect of the jury learning that Belmontes had committed another, previously-undisclosed, execution-style murder. Given the fact that the jury already found in favor of death without the Howard evidence, the answer to the question can be only be a resounding "no." (App. 121a-127a.)

* * *

In sum, in granting Belmontes habeas corpus relief, the Ninth Circuit had elevated the requirements of competent representation in capital cases, and had reduced the requirements for showing prejudice, in a manner never before authorized. Judge Callahan understandably warned that the majority's "particular view of the facts will make it almost impossible for a court in the Ninth Circuit not to grant a capital defendant a new penalty stage trial any time counsel has to balance presenting additional mitigating evidence against any aggravating evidence that would most likely accompany the mitigating evidence." (App. 139a.) This Court's intervention is necessary. [5/]

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5. Similarly, to the extent the Ninth Circuit alluded to Schick's alleged failure to present other evidence of Belmontes' character when young—e.g., overcoming "manipulation" by his grandmother, participating in Little League, being kind and thoughtful—there could have been no ineffectiveness in the *Strickland* sense. It is by no means clear, first of all, that the Ninth Circuit considered this failure—separate from the "failure" to produce the evidence about the psychological effect of Belmontes' childhood "hardships"—as itself justifying the writ of habeas corpus. Further, in light of the aggravating evidence presented by the prosecution, and the mitigation evidence actually produced by the defense, omission of the further evidence cited by the panel could not have been "ineffective." Anyway, as Judges O'Scannlain and Callahan both explained, the cited evidence was of little importance in its own right when compared to the evidence that the prosecution and Schick did introduce. (App. 99a-106a, 127a-137a.)

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: March 30, 2009

Respectfully submitted,

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APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Fernando BELMONTES, Jr., *Petitioner-Appellant,* v. ROBERT L. AYERS, JR., Warden for the California State Prison at San Quentin, *Respondent-Appellee.*	No. 01-99018 D.C. No. CV-89-00736-DFL OPINION

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
May 15, 2007–San Francisco, California

Filed June 13, 2008

Before: Stephen Reinhardt, Diarmuid F. O'Scannlain and Richard A. Paez, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge O'Scannlain

COUNSEL

Eric Multhaup, Mill Valley, California, and Christopher H. Wing, Sacramento, California, for the petitioner-appellant.

Mark A. Johnson, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

REINHARDT, Circuit Judge:

Once again we are presented with a case in which an individual sentenced to death received inadequate representation by his counsel at the penalty phase of his trial. Here, the question is only whether counsel's deficient performance was prejudicial. There can be little doubt that it was.

Fernando Belmontes, Jr. was convicted of first degree murder and sentenced to death in California state court in 1982.

After his conviction and sentence were affirmed by the California courts on direct appeal and in state post-conviction proceedings, Belmontes filed a petition for writ of habeas corpus in the district court, seeking to set aside both his conviction and sentence. In 2000, the district court found that counsel's representation during the penalty phase was deficient, but that his deficient performance did not prejudice Belmontes.

In 2001, the court denied the petition in its entirety. Belmontes appealed. In 2003, we affirmed the denial of relief with respect to Belmontes's guilt-phase claims, but reversed the denial of penalty-phase relief on the ground that the jury was improperly instructed as to the mitigating evidence it was required to consider. *Belmontes v. Woodford*, 350 F.3d 861 (9th Cir. 2003) ("*Belmontes I*").

In 2005, the Supreme Court vacated our judgment and

remanded for reconsideration in light of *Brown v. Payton*, 544 U.S. 133 (2005). *Brown v. Belmontes*, 544 U.S. 945 (2005). We again granted penalty-phase relief because, unlike in *Payton*, Belmontes's petition was not subject to the strict requirements of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Belmontes v. Brown*, 414 F.3d 1094 (9th Cir. 2005) ("*Belmontes II*"). In 2006, the Supreme Court again granted certiorari and by a five to four vote reversed our decision with respect to instructional error, this time on the merits. *Ayers v. Belmontes*, ___ U.S. ___, 127 S. Ct. 469 (2006). The Court then remanded, leaving us with the task of resolving Belmontes's remaining penalty-phase claims, primarily ineffective assistance of counsel.

Belmontes's remaining claims are as follows: (1) that he received ineffective assistance of counsel during the penalty phase of his trial; (2) that he was deprived of due process when the district court denied his request for an evidentiary hearing on his first claim; and (3) that he was deprived of due process and a fair penalty phase trial, and subjected to cruel and unusual punishment, by (a) the admission of evidence of his prior acts of misconduct, (b) the trial court's response to questions from the jury about the consequences of their failure to agree on a unanimous verdict with respect to the penalty, and (c) the trial court's pre-judgment of Belmontes's motion to reduce his sentence. Because we conclude that Belmontes's counsel not only provided deficient representation at the penalty phase of his trial but that Belmontes *was* prejudiced by that deficient performance, we reverse and remand for issuance of a writ of habeas corpus and, if the State so elects, a new death penalty proceeding.[1]

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1. Under California law, a sentencing jury in a death penalty case has only two choices: life without the possibility of parole or death. *See* Cal. Penal Code § 190.2 (West 1978). If, following a reversal of

I. FACTUAL AND PROCEDURAL BACKGROUND

In our two prior opinions in this case, we summarized the facts and history that related to the issues before us. *See Belmontes II*, 414 F.3d at 1102-11; *Belmontes I*, 350 F.3d at 869 78 This is the first time that we have addressed the claim of penalty-phase ineffective assistance of counsel. Thus, we again recite the history and facts of this case, but this time with an emphasis on those facts that are relevant to the ineffective assistance of counsel claim, including facts that were determined during post-conviction proceedings and did not appear in our earlier opinions.

A. The Crime, Investigation, and Guilt Phase of Belmontes's trial

On the morning of Sunday, March 15, 1981, nineteen-year-old Steacy McConnell telephoned her parents and told them that she was afraid because several people, including Belmontes's eventual codefendant Domingo Vasquez, had threatened her. When McConnell's parents arrived at her residence in Victor, California several hours later, they found her lying unconscious in a pool of blood. She died shortly thereafter from cerebral hemorrhaging caused by fifteen to twenty blows to her head with an iron bar. Her house was ransacked and her stereo was missing.

On the Tuesday preceding the murder, several people, including Vasquez and another codefendant, Robert "Bobby" Bolanos, partied at McConnell's house. Although

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the capital sentence, the State chooses not to institute further proceedings with respect to the death penalty, Belmontes will automatically receive a sentence of life without the possibility of parole.

Bolanos left the residence early Wednesday morning, the party continued until Friday, when Vasquez stole a quantity of "black beauties"—amphetamine pills—from McConnell. Upon discovering the theft, McConnell threw Vasquez and his friends out of the house. The group subsequently discussed their dislike of McConnell.

The police investigation of the individuals who had been present at the party led the officers to interrogate Vasquez and Bolanos. Bolanos eventually admitted that he had been involved in the events that led to McConnell's death, and identified Vasquez and Belmontes as his coadventurers. Belmontes, who was nineteen at the time, had not been at the party, but had visited Bolanos over the weekend of the murder.

Belmontes, Bolanos, and Vasquez were each charged with first-degree murder and special circumstances. However, Bolanos soon arranged a deal with the prosecution in which he agreed to testify against Vasquez and Belmontes in exchange for a guilty plea to second-degree burglary and immunity on the murder charge. At Vasquez's preliminary hearing, Bolanos named Belmontes as the main assailant. After the preliminary hearing, the trial judge dismissed the special circumstances charge against Vasquez, who pled guilty to second degree murder. That left Belmontes, who alone proceeded to trial.

Bolanos was the State's principal witness. He testified that on the morning of Sunday, March 15, he and Belmontes drove to Vasquez's residence to hang out. When they arrived, Vasquez was on the phone with McConnell. When Vasquez hung up, he informed them that McConnell would not be home during the latter part of the day. The three were short of cash, and they agreed to burglarize McConnell's residence, steal her stereo, and

"clean house." According to Bolanos, as the men departed Vasquez's house through the kitchen, Belmontes grabbed from the counter an iron dumb-bell bar that Vasquez's wife used for rolling tortillas.

Bolanos told the jury that the three men then drove to McConnell's in Bolanos's car and parked a short distance from the house where Belmontes stated that he would approach the house alone, on foot, carrying the metal bar in case he needed to force entry. Bolanos further testified that Belmontes said that he would gather McConnell's valuables and place them near the door to facilitate a quick getaway, and that Bolanos and Vasquez should wait for about five minutes and then bring the car around to McConnell's house.

Bolanos next testified that Belmontes walked to McConnell's residence, and, after about five minutes, Bolanos and Vasquez drove up and backed into McConnell's driveway. Bolanos heard repeated knocking or banging noises coming from within the house. Vasquez walked to the front door to assist Belmontes. Shortly thereafter, Belmontes and Vasquez emerged from the back door of the house carrying stereo components. Belmontes was sprinkled with blood and Vasquez "looked like he had seen a ghost." According to Bolanos, Belmontes stated that he had had to "take out a witness" because McConnell had been home, and explained that when McConnell heard Vasquez and Bolanos drive up, she looked away from him and he seized the opportunity to hit her with the bar.

Bolanos finally testified that, after leaving McConnell's house, the three drove to the nearby city of Galt, where they intended to fence the stereo. En route, Belmontes threw the bar out of the car window as they crossed a bridge. The trio eventually sold the stereo for $100.

Detective Holman, the lead investigator on the case, testified that Belmontes furnished three tape-recorded statements shortly after his arrest. In the first statement, he denied any involvement in the crime. In the second, he admitted the burglary but denied hitting McConnell. In the third, he admitted hitting McConnell, but insisted that he hit her only once, and then only at Vasquez's direction. He stated that the single blow he delivered caused McConnell to fall down, at which point he dropped the bar and began searching the house for valuables, leaving Vasquez alone with McConnell. Belmontes asserted that he did not pay attention to Vasquez's actions during this period and did not witness the fifteen to twenty fatal blows to the head that McConnell suffered. Holman also testified that a small drop of blood found on the tongue of one of Belmontes's shoes tested as "type O" – McConnell's blood type.

Dr. Maduros, the pathologist who performed the autopsy on McConnell, testified that she died from cerebral hemorrhaging caused by fifteen to twenty blows to the back left portion of her skull. She had a separate contusion on her right temple, which was caused by a single blow of lesser force that did not lacerate the skin. However, he informed the jury that this blow alone would not have caused death and, if it had been the first, it would likely not have caused unconsciousness. Injuries to McConnell's arms, hands, legs, and feet evidenced a struggle.

Belmontes testified in his own defense. He insisted that, while he was searching the back part of the house for something to take, Vasquez struck the fatal blows. Belmontes stated that prior to the murder, he and Bolanos had gone over to Vasquez's house, and that when Vasquez mentioned that McConnell would not be home, they decided to steal her stereo. Although they expected

McConnell to be away, the plan was that Belmontes would go to the door in case she turned out to be home; they thought that because of the confrontation between Vasquez and McConnell at her party a few days earlier, she would become angry and suspicious if she saw Vasquez or Bolanos at her door. Although Belmontes had met McConnell a few times in the past, she did not know that he was a friend of Vasquez and Bolanos. Belmontes stated that it was not he who took the metal bar from Vasquez's house but that while they were all in the car, Vasquez gave it to him to use to break a window, and he then concealed it in his sleeve. Vasquez and Bolanos stayed in the car while Belmontes walked to McConnell's front door. According to Belmontes, he knocked at McConnell's door and, to his surprise, she answered. As soon as he found out that she was home, he abandoned his intent to burglarize her residence. He told her that he had been hitchhiking and had stopped by because it was raining. McConnell invited him in. She noticed a bulge in his sleeve and asked what it was. He showed her the bar and explained that he had it because he was hitchhiking.

Belmontes further testified that five minutes after he entered the house, Bolanos and Vasquez pulled into the driveway. McConnell started walking toward the front door. Belmontes followed behind her and was placing the bar back up his sleeve when Vasquez knocked on the door. Vasquez pushed the door open, saw McConnell, and ordered Belmontes to "hit her." Belmontes followed Vasquez's directive and struck McConnell once on the side of the head with the bar. She fell to the floor. Belmontes dropped the bar, ran to the back bedroom, searched that room and the kitchen, and returned to the living room. Upon returning to the front of the house, he observed Vasquez standing over McConnell and holding the metal bar. He did not see or hear Vasquez hit

McConnell. He could not explain the presence of defensive bruises and contusions on McConnell's hands, arms, and feet.

The rest of Belmontes's testimony was, with a few exceptions, consistent with Bolanos's. According to Belmontes, it was Vasquez who handed him the steel bar after they left McConnell's, and it was Vasquez (not Belmontes) who stated that he had had to take out a witness. Otherwise, his testimony was as follows. Belmontes and Vasquez gathered the stereo components and exited from McConnell's back door. They loaded the stereo components into the trunk. Vasquez got in the back seat, Belmontes rode shotgun, and Bolanos drove. Belmontes wiped blood off the bar and set it down on the floorboard. It was not his idea to throw the bar out the window into the river, but Bolanos and Vasquez told him to do so, and he complied. He concluded his testimony by stating they then sold the stereo for $100, divided the money, bought some beer, and drove to the home of an acquaintance.

After three hours of deliberation, the jury convicted Belmontes of first degree murder with special circumstances. It also made special findings that Belmontes was the actual killer, and that he had the specific intent that death occur.

B. The Penalty Phase

1. *Aggravating Evidence*

At the penalty phase, the prosecution introduced minimal aggravating evidence, the sum total of which consumed only 24 pages of the double-spaced transcript.

The detective who oversaw the investigation of the

crime authenticated two autopsy photographs depicting McConnell's wounds. This was the only evidence relating to the circumstances of the crime that the State introduced at the penalty phase.

William Cartwright, manager of a motel in Ontario, California, testified to an incident in early 1979 in which an individual named Rudy met Belmontes at a motel and attempted to sell him a .32 caliber automatic handgun that he had acquired in a burglary. Belmontes reportedly examined the weapon, cocked it, pointed it at Rudy and said, "I've got it now. Why buy it?" Rudy left the premises and Belmontes retained the weapon.

Steven Cartwright (the record does not disclose any relationship with William) testified that he had a conversation with Belmontes in February 1979 in which Belmontes alluded to the fact that some people were upset with him. As Belmontes talked, he indicated that he had a gun in his belt by slapping his side, and he stated that he was not concerned because he had all the protection he needed.

Ron Cutler, a California Youth Authority ("CYA") counselor, testified that he once observed Belmontes swinging a chair as if he were about to hit another ward, but Cutler was able to intervene before a fight ensued. On cross-examination, he admitted that Belmontes was significantly smaller than the other youth.

Barbara Murillo, Belmontes's former girlfriend, testified about a domestic violence incident that occurred when she asked Belmontes to move out of their shared apartment and to give her his keys to the apartment before leaving. Although Belmontes was willing to leave, he was unwilling to give her the keys because his belongings were still in the apartment. When he tried to

leave without giving Murillo the keys, she attempted to restrain him by grabbing his jacket, tearing off the buttons in the process. During the ensuing fight, Murillo, who was four months pregnant with Belmontes's second child, grabbed a "file" for protection and attempted to phone the police. Belmontes cut the telephone cord with his knife. He then pushed her, hit her on the head, and tried to choke her. At some point during the altercation, he also caused her to drop their infant daughter. The pair were eventually separated by several friends who were present at the time. A neighbor summoned the police, who arrived as Belmontes was leaving the premises.

Finally, the prosecution and defense stipulated to the fact that Belmontes entered a plea of no contest in April 1979 to a charge of being an accessory after the fact to voluntary manslaughter. The court refused to allow the prosecutor to introduce evidence indicating that Belmontes had actually murdered the victim, Jerry Howard. Specifically, the court ruled that

> we have the crime of accessory after the fact to voluntary manslaughter to which the defendant has entered a plea of no contest to which thereafter he was found guilty by the Court pursuant to the plea of no contest. That matter has been adjudicated. It is res judicata with reference to any fact that — or conduct that occurred during the course of the voluntary manslaughter. . . . [The] Court will allow the prosecution to present testimony and evidence that [Belmontes] entered a plea of no contest to being accessory after the fact to voluntary manslaughter. The Court will not allow testimony with reference to whether or not the defendant did in fact do the shooting as alleged, the matter having been adjudicated.

Consequently, the jury was never informed of any of the details of Howard's death or of Belmontes's alleged role in it.[2]

2. *Mitigating Evidence*

The presentation of mitigating evidence by Belmontes's trial counsel, John Schick, was also limited in scope. This evidence primarily provided the jury with a cursory presentation of some of Belmontes's family history and his conversion to Christianity while incarcerated at a Youth Authority facility, and provided some information regarding his conduct during that incarceration.

Belmontes's maternal grandfather, Michael Salvaggio, testified about his daughter's unhappy marriage to Belmontes's father. Salvaggio stated that his daughter was sixteen when she ran away from home and married Belmontes's father, who was unemployed, refused to support his family, drank to excess, and beat her. He also stated that the Belmontes family did not have a stable place to live for extended periods of time. He lamented the fact that his Italian-American daughter had married a man of Mexican descent. Salvaggio said that he was "very close" with Belmontes until he was about thirteen, but thereafter had little contact with him. Salvaggio did state, however, that when Belmontes was sixteen and his grandmother lay dying in the hospital, he visited her every day. He also attended her funeral. Salvaggio further testified that he believed Belmontes was "a victim

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2. On this appeal, the State does not challenge the propriety of the trial court's exclusion of this evidence. Rather, it argues that if Belmontes's counsel had attempted to offer expert testimony as to Belmontes's ability to conform his conduct to societal standards in a structured environment, the evidence as to his role in the Howard killing would be admissible by way of cross-examination. *See infra* at section II.B.2.c.

of circumstance."

Carol Belmontes confirmed that her marriage to Belmontes's father was unhappy and tumultuous. Fernando Belmontes, Sr., was a violent alcoholic who "wouldn't ever work" and who regularly beat her, breaking her arm on one occasion and stabbing her on another. Belmontes was ten years old when the marriage broke up. Mrs. Belmontes remarried, but her second marriage ended five years later, when Belmontes was about fifteen. From that age on, Belmontes was difficult to control. He had not lived with his mother since he was committed to the CYA two years before McConnell's murder. He had a younger brother and sister, with whom he was "very close." Mrs. Belmontes's testimony ended with the following exchange:

Q. How would you view your relationship with your son Fern[ando]?

A. My relationship?

Q. Um-hmm (affirmative).

A. Same as it's always been.

Q. What kind of qualities can you recommend to this jury as they consider his fa[te]?

A. I don't believe he should go to the gas chamber.

Q. Just because you're his mother?

A. No. I don't believe he did it.

Q. Are you aware of the facts of this case?

A. (Affirmative nod)
I know my son.

Mr. Schick: I have no more questions.

Robert Martinez, a close friend of Belmontes's since his early teens, testified that he and Belmontes spent a great deal of time together, usually working on Martinez's low-rider car. Belmontes served as best man at Martinez's wedding and was someone he could turn to for advice and support when he argued with his wife. Martinez also testified that he felt Belmontes was not a violent person. However, with defense counsel's consent, this testimony was struck following an objection from the prosecutor, who argued that if the evidence was admitted, the prosecution should be allowed to impeach Martinez with evidence regarding the Jerry Howard killing.

Belmontes again testified on his own behalf. He recounted that he had a poor relationship with his father, who often came home drunk and hit his mother. He did not like school and stopped attending in the ninth grade (some records indicate it was the tenth grade). He wanted to get a job so that he could help his mother pay the bills. Although he described his youth as "pretty hard," he twice stressed that he did not want to "use it as a crutch."

With respect to his time at the CYA, Belmontes testified that he was in the custody of the Youth Authority from early 1979 until November 1980, four months prior to the crime. While at the CYA, he was employed on the fire crew at the Pine Grove Camp for one year, during which time he worked his way up from last man to number two man, a position of leadership and responsibility. Belmontes also testified that during his incarceration he became involved in the M-2 Christian sponsorship

program, a program that matched a local church-going family with a ward. As part of the program, a ward would be permitted to leave the CYA facility to visit with the family at specified times each week. Belmontes admitted that he initially entered the M-2 program in order to spend time outside of the camp, but after his favorable experiences with his M-2 family, the Haros, he gradually became curious about their Christian faith and embraced it.

Belmontes further testified that after he was paroled from the Youth Authority he stayed at a halfway house in Oakland for two weeks, then went to Southern California for a short period, and finally returned to the Lodi area to take a job with the forest service. He testified that he moved to Lodi in part so that he could be close to the Haros. However, outside of the Youth Authority he had trouble maintaining his religious commitment and "started going back to [his] old ways," in part due to "pressure on the streets." At the time of trial, he had not abandoned his religious beliefs entirely but felt that he was no longer "dedicated one hundred percent" to his religious commitment.

When asked about whether he would be able to contribute to society if sentenced to life in prison rather than death, he stated that he "didn't know." When asked what he would do with the next 50 to 60 years of his life if he were sentenced to life in prison, he said that "it is hard to say. Ain't too many opportunities in there, too many things you can do except try to stay alive. I don't know. Just try to stay alive." He was then asked whether he would be prepared to contribute to society in any way that he could if sentenced to life in prison, to which he responded, "[i]f the opportunity is there, yes."

The Reverend Dale Barrett, chaplain at the Youth

Authority's Pine Grove Facility, testified that he knew Belmontes from his participation in the M-2 Christian sponsorship program. Barrett explained that Belmontes was matched with Beverly and Fred Haro and participated in the program for about a year. In addition, Belmontes was baptized during his stay in the CYA. Only a small percentage of program participants who made a serious commitment to Christianity were baptized. Barrett felt that, unlike the many wards who stayed in the program only to get out of camp and elicit favors from the sponsoring families, Belmontes had not "conned" them. When asked about whether he thought Belmontes should be sentenced to death, Barrett testified that, although he personally believed in the death penalty, he did not think Belmontes deserved to die because he thought premeditation was "a debatable point," and thought Belmontes was a "salvageable" person with "a lot of extenuating circumstances in his life." Barrett was of the view that Belmontes's involvement in "some of the situations in which he found himself"—e.g. McConnell's murder—was attributable to "the enormity of the peer pressure and the kind of sociological circumstances that were part of his life." When asked whether he thought that Belmontes would be able to contribute something if sentenced to life in prison without parole, he stated that he would

> like to think so, based upon the tremendous success that is being realized by a number of people being involved in prison ministries. I'd like to feel that we are having a great deal of success. Perhaps someone could say with regard to Fern[ando], "Do you feel you're a failure?" Obviously, this is not the result we would like to see. About 80 percent of our young men in the program do well, stay out of trouble. The rate of recidivism has been greatly affected by the M-2

> programming. I like to think we make a contribution to their lives and sense of well-being and self-image, and prison ministries can continue to contribute that to the lives of young men who have failed.

When asked whether he would be involved in prison ministry with Belmontes if he were granted life in prison, Barrett said that he would, "if the issue of proximity would be resolvable. If not, I would be anxious to direct others to him geographically on the basis of my associations."

Don Miller, assistant chaplain at the Youth Authority's Preston Facility and the Northern California Director of the M-2 program, testified that he helped place Belmontes in a halfway house in Oakland upon his release from the CYA. Miller stated that, at the time, he felt "a little bit doubtful" about whether Belmontes should have been released from the facility because, in Miller's view, he needed a little bit more instruction regarding "[a]ccepting authority and being able to adjust to the community outside." Miller testified that, after being released from the CYA, Belmontes stayed at the halfway house for only two weeks before moving to the Lodi area to take a job with the forest service. During those two weeks, however, Belmontes returned to Preston on a few occasions to speak to wards about what life was like "on the outside." Miller described Belmontes, and his message, as well-received by the CYA wards, and he believed that if Belmontes were committed to prison for life, he would be good at counseling other prisoners not to make the same mistakes that he had. Miller was enthusiastic about working with Belmontes in this capacity and stated that Belmontes "definitely would be used in the prison system for this kind of activity" because he related well to other prisoners, especially those who shared his ethnic

background.

Darlene Martinez, a born-again Christian and the wife of Belmontes's friend Robert Martinez, testified that she had known Belmontes for six or seven years and considered him a close friend. Darlene recounted that when Belmontes visited them after his release from the Youth Authority, he told her that he, too, was a born-again Christian. He also mentioned his disputatious relationship with his girlfriend, Murillo, and stated that he was planning to move in with her. During the conversation, Belmontes expressed concern that Murillo was not a Christian, and he worried that he would be unable to maintain his Christian faith on his own.

Beverly and Fred Haro, Belmontes's M-2 sponsors and members of Reverend Barrett's church, testified that Belmontes spent Wednesday evenings and weekends with them for almost a year. They felt that they had a good relationship with Belmontes, who attended church with them. They treated him like their own son, and he opened up to them and was a good influence on their own teenage son. They saw him several times after his release from the CYA. Fred Haro stated that he had "compassion as a son" for Belmontes and that Belmontes had been genuine in his commitment to the M-2 program and his affection for his sponsors. He also stated that, although he was "strongly for the death penalty," he believed Belmontes was innocent and that, because he was innocent, he did not deserve to die.

3. *Closing Arguments*

During closing arguments, the prosecutor described the evidence introduced in aggravation—that Belmontes had onceswung a chair at another CYA ward, had been involved in the domestic violence incident with Murillo,

had taken a gun from a person who offered to sell it to him, had once told someone that he was carrying a gun, had been convicted of being an accessory after the fact to voluntary manslaughter, and had murdered McConnell in a calculated manner. Turning to the mitigating evidence, the prosecutor stated that Belmontes's age was a factor that "goes both ways," that his religious beliefs did not really extenuate the gravity of the crime, and that "the evidence upon which [Belmontes's] religious experience rests is somewhat shaky." Moreover, he noted that Fred Haro's and Reverend Barrett's favorable assessments of Belmontes's character and capacity to do well in prison were not entirely credible because neither witness thought Belmontes could commit the crime the jury "knew" he committed, and thus that these witnesses did not truly know Belmontes. The prosecutor further argued that there was no lingering doubt regarding Belmontes's guilt, and stated that Belmontes had shown no remorse regarding McConnell's murder. He then stated that the evidence in mitigation and in aggravation were a "wash" or a "draw" until one considered the circumstances of the crime; taking that factor into account, the appropriate penalty was, in the view of the prosecutor, death.

After the prosecutor's closing statement, the court permitted Belmontes to address the jury personally. He began by stating that, although his childhood was not "a very good childhood," he did not want to use it as a crutch. He further stated that, after spending time with the Haros and seeing how they lived,

> I wanted to be like that, I wanted to change my life and see how it was. I tried. Like I said, it's a lot easier to do while you're in jail because you have a lot less pressures. When I did get out. . . I guess I couldn't deal with the pressures out there. Like I say, it's a lot different.

Turning to his religious beliefs, he stated that he was

> not coming here and saying right now that I'm a full-fledged Christian or a born-again. I was born again and I still feel the same way, but I'm not using that as a crutch, also. But it is something that I tried and I really believe in.
>
> As for the verdict right here that you're going to deliberate on right now, I myself would like to keep my life and not really lose it in the gas chamber.
>
> [The prosecutor] has stated that he does not feel I have remorse. [He] does not know. . . . [He] was not there that day.

With respect to the crime, Belmontes stated that the prosecutor

> has told you that I'm the actual killer. He does not know. He wasn't there. He's only going on what he thinks happened that day . . .
>
> He says I can't put my feet in [McConnell's] shoes. It's true, I can't. I didn't go through it. I wasn't the one who was actually killed. But he hasn't had to sit and think about actually getting put in the gas chamber or life without imprisonment [sic]. I'm not saying I didn't do it or wasn't guilty. Like I said, I was involved to a certain extent. I have to pay for what's happening — what happened, and I can deal with that. You know, there's only two choices right now, life without the possibility or the death penalty. Both of them ain't really — isn't really any good. There's always the possibility that while you are living with life without the possibility that you will die in there. You can't really say. Things happen.

> But there is an opportunity to achieve goals and try to better yourself. . . . I myself would really like to have my life and try to improve myself.
>
> [The prosecutor] has said that I stood up there and hit [McConnell] once and then hit her again. . . . Again, he wasn't there. He doesn't know that I actually hit her the 20 times like he says I was. This is his belief. . . . He doesn't know me. . . . I just ask that you think about this a lot and give it a lot of thought as to the verdict on this penalty phase. That's it. Thank you.

After Belmontes made this statement, his counsel, John Schick, argued first that, notwithstanding the jury's earlier verdict, there was no evidence that the murder was premeditated. Next, he stated that, although he did not want to suggest that "the presence of religion in itself is a totally mitigating factor[,]" religion plays a "very, very vital function . . . in anybody's life." With respect to Belmontes's childhood,
Schick said only that

> while Mr. Belmontes has told you he is not going to use a crutch for [sic] what happened in the first part of his life, I'd like to suggest to you until he got to know Beverly and Fred Haro, . . . he didn't really know, he didn't really have the sense of values that a human being, a young man about to embark upon adulthood should have. And that is what his experience with Reverend Barrett and Beverly and Fred Haro in the time he was there in their home while he was in the California Youth Authority meant.

He went on to state that

what I hope the evidence suggests to you is Fernando Belmontes cannot make it on the outside. I think it is pretty clear from the experience that he had inside, the kind of development he undertook, the kind of experiences he had with the Haros as compared with his being placed out on his own. . . . Again, we are not saying this is an excuse, but you have to understand the problems that people have in dealing with their lives.

Although Schick argued that Belmontes could not make it "on the outside," he did not argue that he *could* or *would* make it "on the inside." Schick then proceeded to the dominant theme of his closing argument:

Punishment is one of two choices. Consider, if you will, a young man who is 21 years old, Mr. Belmontes. . . . [L]ets assume he has 50 to 55 years left of his life. . . . [A] sentence of life without possibility of parole means that for everyday, 24 hours a day, seven days a week, 365 days a year he will be without that most precious commodity that we have, freedom. You will punish him far greater and for a far more significant impact upon his life by sending him to prison for the rest of his life.

You've probably heard about people in a position of being on death row asking for execution. You all remember the Gary Gillmore charade a few years ago, prisoner in Utah who wanted to be killed. There are some people who feel that way because they can't deal with it. It is easier to die than face that possibility. It is easier to die than face the possibility of never, ever having your freedom. If you want to impose, and I think you need to impose punishment. This young man needs to be punished. I'm not going to tell you that isn't a truth. But if you want to

impose a punishment upon him that has meaning, that has teeth to it, send him to prison for the rest of his life, however long that may be. . . . I'm only trying to suggest something because it's difficult for any of us to conceive of such a harsh penalty as life in prison without ever being released.

And it is harsh. You remember during voir dire you were asked to compare these two penalties. I think it was constantly referred to as life without the possibility as being the more lenient of the two penalties. Well, to the extent that [the prosecutor] believes Mr. Belmontes should die, I suppose it is lenient.

Schick also asked the jury to think about why, as a society, we decide to kill people. We justify it in war. Certainly nobody has quarrels with that. . . .

But how do we feel? How do we justify it? How do we justify taking another of God's creatures by killing them? We dehumanize the other people. Look at the Vietnamese war. We weren't fighting the Vietnamese. We were fighting Gooks. Look at the Japanese war, we called them Wops and Japs. World War I we fought the Huns. We made it possible in our mind to dehumanize these people so we could go out and kill them and not feel guilty about it.

That is exactly what we must do and what you are being asked to do in evaluating the life of Fernando Belmontes. You are being asked to look at him and say to yourself, this man is not a human being. . . .You must be able to do that, to go through that process of dehumanizing him in order to kill him. And ladies in gentleman, that is exactly what the evidence I produced at this penalty trial has shown.

. . . [H]e has not been proven to be dehuman [sic].

At no point did Schick mention any of the traumatic experiences that Belmontes underwent during his childhood or his youth.[3] As a result, he failed to explain to the jury how those experiences affected Belmontes; what the relationship was between the tragic events and Belmontes's subsequent criminal conduct; and why the jury should consider those circumstances in determining whether Belmontes was an individual who should be put to death or whose life should be spared.

4. *The Jury's Penalty Deliberations and Verdict*

The jury deliberated for a day and a half before reaching a verdict. On the first day, after several hours of deliberations, the jury sent the judge a note asking, "What happens if we cannot reach a verdict?" and "Can the majority rule on life imprisonment?" The jury was brought back into the courtroom, and the judge reread a portion of the jury instructions, emphasizing that "all 12 jurors must agree, if you can."

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3. The dissent takes issue with this statement and notes that we "fail[ ] to give proper emphasis to the fact that several witnesses testified about those issues." Dis. Op. at 6828. It is not we who failed to emphasize this testimony; it is Schick. In fact, he never even mentioned it in his closing argument. Schick wasted his only opportunity to remind the jury of the insubstantial and inadequate mitigating testimony that he did manage to present and to explain to them why that evidence should persuade them to spare Belmontes's life. Our cases make clear that in addition to presenting witnesses to testify about mitigating circumstances, defense counsel must also explain the significance of the mitigating testimony in his closing statement. *See Mayfield v. Woodford*, 270 F.3d 915, 928 (9th Cir. 2001) (en banc) (finding deficient performance in part because counsel "failed to explain to the jury the significance of the mitigating evidence . . . during his closing argument"). For further discussion of this issue, see *supra* at section II.B.2.a.

Thereafter, the following exchange occurred:

JUROR HAILSTONE: If we can't, Judge, what happens?

THE COURT: I can't tell you that.

JUROR WILSON: That is what we wanted to know.

THE COURT: Okay. I know what will happen, but I can't tell you what will happen.

MR. SCHICK: Maybe we should inquire whether the jury could reach a verdict.

THE COURT: Do you think, Mr. Norton, you will be able to make a decision in this matter?

JUROR HAILSTONE: Not the way it is going.

JUROR NORTON: That is tough, yes.

THE COURT: Do you think if I allow you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?

JUROR NORTON: I believe there is a possibility.

After this exchange, the jury continued its deliberations. A little more than a day later, the jury

reached a verdict and sentenced Belmontes to death. After the verdict, the judge sent a letter to the jurors thanking them for their service and telling them that their "decision is acceptable and shall be followed." Subsequently, he imposed the judgment and sentence of death.

C. State Appeals and Federal Habeas Review

The California Supreme Court affirmed Belmontes's conviction and sentence in 1988, *People v. Belmontes*, 755 P.2d 310 (Cal. 1988), and the U.S. Supreme Court denied certiorari in 1989. *Belmontes v. California*, 488 U.S. 1034 (1989). Belmontes then filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California, which the court held in abeyance while Belmontes exhausted additional claims before the California Supreme Court.

In 1993, after the California Supreme Court summarily dismissed Belmontes's petition, denying him an evidentiary hearing on any of his claims, proceedings on the federal writ resumed before a magistrate judge. In 1996, the magistrate judge denied Belmontes's request for an evidentiary hearing on various claims, but granted his motion to expand the record to include depositions, declarations, and other documents submitted by the parties. The magistrate judge and the district judge thereafter considered all of this material when making their rulings.

The deposition testimony, declarations, and other evidence submitted by the parties revealed critical omissions in Schick's mitigation investigation and in his preparation for the penalty phase. These submissions also demonstrated that there was a substantial amount of additional mitigating evidence that could and should have been investigated, developed, and presented at the

penalty phase of Belmontes's trial. Finally, the evidence and the record also revealed that counsel failed to properly prepare the witnesses for the penalty phase hearing and failed to explain to the jury the relevance of the meager evidence he did present.

At the habeas proceeding, Belmontes presented the testimony of two experts on ineffective assistance of counsel who opined that Schick had not prepared for the penalty phase in a reasonably competent manner. The first expert, James Larsen, is the former deputy public defender who represented Belmontes's codefendant, Domingo Vasquez, for whom he negotiated a plea to second degree murder. At the time of Belmontes's trial in 1982, Larsen was one of the most experienced criminal defense attorneys in San Joaquin County, the county in which Belmontes was tried. Belmontes's second expert, Ephraim Margolin, is the former president of the National Association of Criminal Defense Lawyers, was the founding president of California Attorneys for Criminal Justice, and was a lecturer at Boalt Hall School of Law, Santa Clara Law School, and Hastings Law School for many years. At the time of his deposition testimony, Margolin had tried numerous murder cases and had represented scores of criminal defendants on appeal in jurisdictions across the country. He had also served as an expert with respect to the competency of trial counsel in numerous capital habeas proceedings.

In his deposition, Larsen testified that a reasonably competent trial attorney representing a capital defendant in San Joaquin County in 1982 would have known that he had a duty to conduct a thorough investigation of all potentially mitigating factors, including the defendant's background and mental state. When asked about the basis of that opinion, Larsen stated that his opinion was based upon the California and U.S. Supreme Court cases

establishing the standards for competent representation in capital cases, as well as the American Bar Association standards regarding the duty of defense counsel, that were in existence prior to 1982.

Margolin likewise testified that any reasonably competent attorney representing a capital defendant in California in 1982 would have known that investigating both the positive and negative aspects of a defendant's mental state was essential. Such a lawyer would likewise have known that he had a duty to obtain information about the defendant's childhood, personality, history of medical and mental health problems, and to gather all school and medical records. When put on notice that the defendant might be a drug user, such a lawyer would also have known that he had a duty to investigate the extent of the defendant's drug use and its effect on his behavior.

With respect to whether Schick's mitigation investigation had been performed in a constitutionally adequate manner, Larsen testified that, in his view, Schick had "not act[ed] as a reasonably competent attorney" in conducting his penalty phase investigation because he failed to investigate potential mitigating evidence related to various mitigating factors set forth in California's death penalty statute, most notably evidence related to Belmontes's mental state. Specifically, Larsen noted that there was information in the pre-trial report prepared by psychiatrist Dr. Cavanaugh, the reports prepared by Schick's investigators, and Belmontes's CYA file that would have led a reasonably competent attorney to conduct further investigation with respect to Belmontes's background and mental state.

Margolin likewise testified that, in his view, Schick did not act in a competent manner in preparing for the penalty phase of Belmontes's trial. Specifically, he

testified that Schick performed incompetently in

> fail[ing] to investigate leads which should have been obvious to him.
>
> Where he did attempt to present evidence, he presented it in a way which did not link it to anything that would have been meaningful to the jury. He did not have a coherent notion of why he [was] presenting what he [presented]. . . .
>
> [H]e did not prepare the witnesses for the testimony
> which he was eliciting, and I think that he . . .
> infected the whole [penalty] proceeding . . . with incompetency.

1. *Schick's Mitigation Investigation and Penalty-Phase Preparations*

The evidence at the habeas hearing revealed that a month or two before trial, Schick had an investigator, Jim Berwanger, contact several potential penalty-phase witnesses, including a few of Belmontes's friends and family members, the Haros, and a few CYA staff members. After Berwanger met with these potential witnesses, he prepared three brief reports. Schick obtained Belmontes's CYA file and met once with Assistant Chaplain Don Miller. Berwanger's reports and Belmontes's CYA file constitute the sum total of the reports that were prepared and the documents that were gathered in preparation for the penalty phase. Based on this investigation, Schick decided that his goals with respect to the penalty phase would be to (1) humanize Belmontes, (2) show that he would not be a difficult prisoner and could form good relationships with people, (3) provide the jury with information about his

background, and (4) raise lingering doubt about whether Belmontes was the actual killer.

Although Schick hired a psychiatrist, Dr. Cavanaugh, to evaluate Belmontes's mental state for purposes of the guilt phase, he did not ask Cavanaugh to comment on any issues relevant to the penalty phase, and did not consult any psychologists or psychiatrists with respect to any possible mental defect, impairment, or condition that might be relevant to sentencing as opposed to guilt. Specifically, he did not ask any expert to evaluate the effect on Belmontes of the mitigating evidence regarding his troubled childhood or his mental condition. Schick repeatedly testified that he had no strategic reason for failing to consult with Dr. Cavanaugh or any other psychiatrist or psychologist about the import of such mitigating evidence or its relationship to Belmontes's subsequent behavior. Indeed, even when the State's attorney asked Schick questions designed to encourage him to state that he had a tactical reason for this failure, Schick testified that his decision not to conduct such an investigation was not motivated by fear of opening the door to damaging rebuttal evidence or any other rationale. Schick gave the following account of his mental processes regarding his failure to conduct an investigation or to present such evidence:

> I can't remember going through a conscious process and saying, "Should I develop [mental state mitigation evidence]?" And, "Therefore for the such-and-such tactical reason I'm not going to do it." It just wasn't something I was focused on. . . . I can't recall going through the process of saying to myself, "Should I put on a psychiatrist at this stage?"
>
> And I can't tell you as I sit here today that there was some tactical decision. . . .

> I can't recall going through any processes like that. We had interviewed and focused our penalty investigation on personal background witnesses that were called and made reference to, and that's where I put my emphasis in the penalty presentation. What I'm trying to say is that I don't think I cognitively went through and rejected it for any reason.

In addition to failing to consult a psychologist or psychiatrist, Schick failed to pursue a host of leads, many of which would have led to the discovery of additional mitigating evidence and would have humanized Belmontes.

Although Schick was aware, through Belmontes's CYA file and other sources, that Belmontes had suffered from rheumatic fever and other illnesses as an adolescent, and knew that these illnesses had been markedly debilitating and that Belmontes had been repeatedly hospitalized as a result, Schick never requested or obtained Belmontes's medical or hospital records.

Schick also knew that Belmontes had a history of serious drug abuse, yet he did not investigate whether mitigating evidence related to Belmontes's drug use should be presented at the penalty phase.

Belmontes's CYA file also put Schick on notice that Belmontes had dropped out of school in the tenth grade and suggested that he had experienced some difficulties there, yet
Schick did not obtain any of Belmontes's school records, nor did he contact any of Belmontes's former teachers.

Yet another document in Belmontes's CYA file noted the fact that Belmontes had been involved "in the Cadets, scouts and little league and also involved in school

organized groups and athletics." Schick did not investigate Belmontes's involvement in any of these activities, nor did he obtain or present to the jury any information about any other aspects of Belmontes's childhood that might further humanize him or show that he possessed a number of positive attributes.

Belmontes's CYA file also made clear that Dr. Alayne Yates had performed psychological testing on Belmontes during his time in the Youth Authority, the results of which were easily obtainable. Another document in the file suggested that Belmontes might be suffering from depression. Despite his awareness of the psychological testing and the possibility that Belmontes suffered from depression, Schick did not obtain a copy of the results of the CYA psychological testing, did not discuss Dr. Yates's evaluation of Belmontes with her or with any other psychiatrist or psychologist, and, as noted above, did not seek an independent evaluation of Belmontes's mental health or personality traits for purposes of the penalty phase. As Schick testified, he simply did not think about exploring these matters in connection with his penalty phase defense.

With respect to Belmontes's temperament and adjustment to the CYA, the file contained numerous references to the fact that Belmontes possessed positive qualities. In one report, for example, a CYA staff member described Belmontes as someone
who "relates to all ethnic groups," is non-delinquent, and is passive rather than aggressive, exploitive, or assaultive. In another, a CYA staff person noted that, even after being pressured by other Chicano wards to retaliate against a ward who had stolen his personal belongings, Belmontes refused to engage in violence and instead asked CYA officials to transfer him to another facility where he would not face such pressures.

Notwithstanding these leads, Schick did not seek to obtain any additional information about the incidents of positive conduct described above, nor did he discuss with any psychologist or psychiatrist or other expert Belmontes's prospects for positive institutional adjustment.

In addition to failing to investigate numerous leads, Schick did little to prepare the witnesses he called to testify. With respect to what had been done in order to prepare Belmontes to make a statement to the jury at the close of the penalty phase, for example, Schick testified that he and Belmontes "probably talked about it a little bit. . . . I'm sure he talked a little bit about what he was going to say, and I may have offered advice to him." If he did offer Belmontes advice, it was not very good advice. In Belmontes's penalty phase testimony, he second-guessed the jury's verdict, he showed little remorse, he could not articulate any concrete way in which he would contribute to society if he were sentenced to life in prison, and he did not explain any of the mitigating evidence or offer the jury any reasons why they should spare his life. All in all, the testimony makes plain that Schick failed to adequately and effectively prepare Belmontes for this crucial portion of the trial.

2. *Additional Mitigating Evidence That Should Have Been Presented to the Jury*

Belmontes's habeas counsel's investigation revealed that there was a large quantity of mitigating evidence related to Belmontes's background and mental state that was never uncovered or presented to the jury on account of Schick's failure to investigate, to follow up on various leads, and to have a psychologist or psychiatrist evaluate Belmontes for purposes of the penalty phase. With respect to Belmontes's childhood and adolescence, habeas

counsel's investigation revealed that, in addition to growing up in a poverty-stricken family in which his father, a profound alcoholic, beat his mother severely and regularly, Belmontes dealt with a host of other traumas. When he was five years old, for example, his 10-month-old sister died of a brain tumor. After her death, Belmontes exhibited symptoms of depression and repeatedly visited the cemetery where she had been buried. In addition to dealing with his father's alcoholism, Belmontes also suffered as a result of his maternal grandmother's alcoholism and prescription drug addiction, which, in combination with her manipulative and controlling behavior, caused constant strife within both his immediate and extended family.

In spite of the adversity he experienced, Belmontes was a kind, responsible and likeable child with a very pleasant demeanor. He was a loving and protective older brother to his two younger siblings, and was kind and respectful toward his maternal grandparents notwithstanding the fact that they disapproved of him on account of his mixed racial background. He participated in Little League, the Navy Cadets, team sports, and had a paper route. In his early years, he kept up in school, made friends easily, and got along with his teachers.

At age 14, however, Belmontes was beset by rheumatic fever, a condition for which he was repeatedly hospitalized. The disease was significantly debilitating and required him to stop attending school and to terminate his involvement in sports and other social activities. As a result, he was isolated from his peers and unable to pursue the means through which he had formerly escaped his traumatic home life. He was also repeatedly told that, as a result of this condition, he would

likely not live past 21 years of age.[4] He became depressed, withdrawn, and lost some of the positive personality traits that seemed to be developing during his early years.

Shortly thereafter, his mother and stepfather divorced. As a result, the family was forced to move into a cheap motel in which Belmontes and four family members lived in "a really small, one-room shack." During this time, their lives were disrupted and unstable. His mother's behavior became erratic. She engaged in casual sexual relations with a number of men, and frequently brought the men back to the motel room in which the family lived.

By the time he was a teen, Belmontes had started using drugs on a regular basis. Around the time of McConnell's murder, he was regularly using marijuana, heroin, LSD, and PCP.[5]

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4. The dissent argues that Belmontes's illness was not severe. Dis. Op. at 6829. Regardless of whether or not the disease was actually lifethreatening, Belmontes's doctors and family behaved as though it were. The social isolation and physical limitations that they imposed on Belmontes, whether or not they were necessary, caused him to suffer significant negative psychological effects. Additionally, Belmontes's belief that he would die young had a profound psychological effect on him, regardless of whether it was medically accurate. The dissent quotes Dr. Yates's testimony that although Belmontes's mother expected Belmontes to die young, Belmontes never believed that he would. Dis. Op. at 6836. However, according to Barbara Murillo, Belmontes's girlfriend and the mother of his children, Belmontes did believe that he would die by the age of 21, causing him to take risks that he would not have taken if he believed that he had a future. Murillo even testified that when she yelled at Belmontes, he would reply, "You won't have to put up with me because I won't be around long."

5. The dissent's claim that Barbara Murillo testified that Belmontes did not do drugs because it was bad for his illness is puzzling. Dis. Op at 6836 n.20. According to her declaration, when they first started dating, Belmontes did not do drugs or alcohol *when they went out*. Murillo also stated that Belmontes's mother did not approve of

In addition to discovering the evidence described above, habeas counsel's investigation made plain that Schick should have utilized the testimony of a psychologist or psychiatrist to explain to the jury effectively the impact on his conduct and on his mental health of the multitude of traumas Belmontes experienced as a child and adolescent. Specifically, such an expert could have explained to the jury the psychological impact on Belmontes of his father's severe alcoholism; of witnessing severe domestic violence between his parents; of his family's poverty; of observing his mother's profligate sexual activity; of being severely ill during a critical stage in his social development and his removal from the normal experiences of teenage life, including social interaction with his peers; of his symptoms of depression and the repeated predictions that he would die before he reached adulthood; and finally, of his history of substance abuse. Such an expert also could have explained the extent to which these problems caused or contributed to Belmontes's general behavior and to his involvement in McConnell's murder.

The deposition testimony of Dr. James Missett, which Belmontes submitted to the district court, reveals the extent to which such an expert could have explained the significance of the difficulties that Belmontes experienced, in addition to explaining the significance of the positive aspects of his early development. Specifically, Dr. Missett testified that, prior to the onset of rheumatic fever, Belmontes was functioning in an exemplary manner vis-a-vis children who faced similar privation and trauma during their formative years, a fact that suggests Belmontes possesses positive and conforming core

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his drug use because *she believed* it was bad for his illness. Moreover, Murillo's declaration contains multiple references to Belmontes's drug use, including his use of heroin.

personality traits. However, the combination of the traumas he experienced early on in life and his struggle with rheumatic fever caused him to "los[e] ground in comparison with his peers [both] academically [and] socially" and "intensified [his] sense of himself as defective, something from which he never recovered." According to Dr. Missett, this in turn led to Belmontes's substance abuse problems and his eventual involvement in criminal activity. With respect to the evidence regarding Belmontes's background that was offered at the penalty phase, Dr. Missett stated that

> the critical thing to me . . . was that there was no reference whatsoever in the penalty phase testimony to the linkage that exists between these various factors[,] . . . to the way in which the behavior at one point in time could be related to the experience that Mr. Belmontes had earlier in life, or to the way that the various biological, social, and environmental, educational, and other factors interrelated in Mr. Belmontes'[s] life and could be focused as of the time either of the killing of Ms. McConnell or at the time of his trial and sentencing.

In other words, conspicuously missing from the penalty phase of Belmontes's trial was the testimony of an expert who could make connections between the various themes in the mitigation case and explain to the jury how they could have contributed to Belmontes's involvement in criminal activity.

With respect to Belmontes's experience as a ward at the CYA, habeas counsel uncovered and presented to the district court considerable additional evidence that could have been presented to the jury. As noted above, there were many references to Belmontes's positive conduct in the CYA contained in his file, including his refusal to

engage in gang violence. Other documents in the file stated that Belmontes relates well to others, is passive, follows directions, and likes working with young people. Dr. Yates could have testified that she diagnosed him as a conformist, not a manipulator. Although there were also negative aspects to Belmontes's time in the CYA that were noted in the file—namely that Belmontes struggled to adjust when transferred from one institution to another, and that he had, at one point, been involved in the formation of a Chicano clique—the file revealed that his conduct was, on the whole, quite positive.

On an entirely separate point, Schick could have obtained evidence from Dr. Yates regarding Belmontes's prospects for positive institutional adjustment. Similarly, he could have obtained evidence in that regard from an expert witness such as Gerald Enomoto, the former Director of the California Department of Corrections and current United States Marshal for the Eastern District of California. Enomoto could have testified that Belmontes adjusted well to the structured environment of the CYA and was likely to be able to conform his conduct to societal norms if confined in a state prison. Although the State focused on several negative reports in Belmontes's CYA file, Enomoto told the district court that the reports in the file showed a clear trend of improvement, with trouble at the beginning but very positive conduct once Belmontes had the opportunity to acclimate to the facility. Enomoto found the fact that Belmontes had refused to engage in

gang violence to be extremely significant and very positive.[6]

* * *

The parties filed cross motions for summary judgment. In 2000, after several years of inaction, the district judge withdrew his referral of the matter from the magistrate judge, heard oral argument on the ineffective assistance of counsel claim and subsequently ruled that counsel had been deficient but that Belmontes did not suffer prejudice as a result. The district judge's decision was based on the written evidence submitted by the parties, in accordance with the magistrate judge's previous ruling denying Belmontes's request for an evidentiary hearing with live witnesses. In so ruling, the court noted that "[t]he record here shows that trial counsel pursued no investigation whatsoever into Belmontes' mental state for the penalty phase. Schick acknowledged that after consulting Dr. Cavanaugh on competency, insanity, and diminished capacity, he had no further contact with Dr. Cavanaugh, or with any other psychiatrist in relation to the penalty phase." On that basis, the court held that "[c]ounsel's failure to investigate mental state evidence for presentation at the penalty phase, even where such evidence is unhelpful at the guilt phase, is not reasonable under Ninth Circuit precedent."

With respect to prejudice, however, the district court held that "Schick introduced testimony as to most of the factual matters" that Belmontes argues should have been introduced, and that Belmontes "provides no reason to believe that the jury needed professional help, *beyond*

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6. Whether the evidence regarding institutional adjustment should have been adduced is a matter we discuss separately. *See* section II.B.2.c.

defense counsel's argument, to understand evidence of petitioner's difficult childhood or prospects for institutional adjustment."[7] (emphasis added). The court then referred Belmontes's six remaining claims, which had not yet been briefed, to the magistrate judge. In January of 2001, the magistrate judge recommended denying relief with respect to the outstanding claims, and in May 2001, the district court adopted the magistrate's findings and recommendations, denied the petition, and entered judgment against Belmontes.

Belmontes appealed. The subsequent history of this case is set forth above. We must now resolve Belmontes's ineffective assistance of counsel claim, and a few related claims that we have not previously resolved.

II. DISCUSSION

A. Standard of Review

Belmontes's federal habeas petition was filed prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and thus, pre-AEDPA standards apply to his claims. *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2003). This court reviews a district court's decision to deny habeas relief *de novo*. *Raley v. Ylst*, 470 F.3d 792, 799 (9th Cir. 2006). "Under pre-AEDPA law, we consider a claim alleging ineffective assistance of counsel as a mixed question of law and fact that we review *de novo*." *Summerlin v. Schriro*, 427 F.3d 623, 628 (9th Cir. 2005) (en banc) (citing *Rios v. Rocha*, 299 F.3d 796, 799 n.4 (9th Cir. 2002)). "We review for clear error, however, the district court's findings of fact."

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7. As noted above contrary to the district court's statement, defense counsel, in his closing argument made no mention of the pertinent evidence and did not attempt to explain the relevance of such evidence to Belmontes's personality and future conduct.

Frierson v. Woodford, 463 F.3d 982, 988 (9th Cir. 2006). Finally, "[b]ecause this is a pre-AEDPA case, we do not review the state court's legal conclusions to determine whether they are 'objectively unreasonable;' rather, we 'simply resolve the legal issue on the merits, under the ordinary rules.' " *Summerlin*, 427 F.3d at 628 (quoting *Belmontes II*, 414 F.3d at 1101, *rev'd on other grounds*, *Ayers v. Belmontes*, ___ U.S. ___, 127 S.Ct. 469).

B. Penalty Phase Ineffective Assistance of Counsel

1. *Procedural Default*

[1] The State argues that Belmontes's ineffective assistance of counsel claim is procedurally defaulted because Belmontes "never presented or developed the factual bases of . . . [this] claim[ ] to the state courts" and because the habeas petition in which he raised this claim before the California courts was untimely. These arguments fail for several reasons. First, Belmontes did present the factual basis for his federal claim to the California courts. In rejecting this argument, the district court correctly observed that the State overlooks critical passages from Belmontes's filings before the California courts.

Specifically, the district court noted that

> [i]n support of the merits of his ineffective assistance of counsel claim, [Belmontes's] verified reply [filed with the California Supreme Court] states that "Trial counsel acknowledges that he limited his mental state investigation to Dr. Cavanaugh's interview, did not conduct any comprehensive background investigation regarding petitioner's physical and mental conditions during his upbringing, and did not

> follow up the unresolved issues emanating from Dr. Cavanaugh's examination with psychological testing or any other means." Petitioner was unable to further describe this claim in state court because the California Supreme Court denied his requests for funds to conduct follow-up investigations and examinations. Thus, petitioner's state court claim referred to evidence and potential evidence that now provides the basis for his federal court claim.

[2] Second, because the California Supreme Court considered the merits of Belmontes's claims, rejecting them "on the merits as well as on procedural grounds," we may reach the merits as well. In *Harris v. Reed*, 489 U.S. 255 (1989), the Supreme Court held that

> procedural default precludes federal habeas review . . . only if the last state court rendering a judgment in the case rests its judgment on the procedural default. . . . [P]rocedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "'clearly and expressly'" states that its judgment rests on a state procedural bar.

Id. at 262-63. Thus, where, as here, the state court did not "clearly and expressly" rely solely upon procedural default in rejecting a petitioner's claim, this court may address the merits of that claim.

Finally, even if the California Supreme Court had clearly relied upon a rule of procedural default in rejecting Belmontes's ineffective assistance of counsel claim—namely California's rule regarding untimely habeas petitions—we would nonetheless reach the merits of that claim. We did not recognize California's procedural default rules regarding untimeliness as independent and

adequate state grounds for rejecting a petitioner's habeas claim until 1993, if not later, *see Karis v. Calderon,* 283 F.3d 1117, 1132 n.8 (9th Cir. 2002); *Morales v. Calderon*, 85 F.3d 1387, 1393 (9th Cir. 1996), well after the California Supreme Court rejected Belmontes's claim. Accordingly, we reject the State's procedural default argument and proceed to the merits of Belmontes's ineffective assistance of counsel claim.

2. *Ineffective Assistance:*

"The Sixth Amendment right to counsel in a criminal trial includes 'the right to the effective assistance of counsel.' " *Summerlin,* 427 F.3d at 629 (quoting *McMann v. Richardson,* 397 U.S. 759, 771 n.14 (1970)). "This right extends to 'all critical stages of the criminal process,' including capital sentencing." *Id.* (citations omitted).

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8. Belmontes argues that his due process rights were violated when the magistrate judge denied his motion for an evidentiary hearing on this claim. We reject this argument for two reasons. First, Belmontes did not timely object to the denial of his motion for an evidentiary hearing with oral testimony. Indeed, he waited more than four years after the magistrate judge's ruling to raise such an objection with the district judge and did so only after the judge had rejected his claim on the merits on the basis of a fully developed record. Second, and more important, under 28 U.S.C. § 2246, "[o]n application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit." Although Belmontes was not afforded the opportunity to submit his evidence in support of his ineffective assistance of counsel claim through oral testimony, he was able to expand the record, *see* Rules Governing § 2254 Cases, Rule 7, and submit all of that evidence through deposition testimony and other documentary evidence. Resolving the claim on the basis of such evidence was, under the circumstances of this case, not an abuse of discretion. Belmontes had a fair opportunity to develop the factualrecord in support of his claim before the district court. Thus, his constitutional rights were not violated by the magistrate judge's denial of his motion for an evidentiary hearing based on oral testimony.

In order to prevail on a claim of ineffective assistance of counsel, a petitioner must show that his trial counsel's performance "fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

a. Deficient Performance:

Under *Strickland*, counsel's competence is presumed. Thus, Belmontes must rebut this presumption by demonstrating that Schick's performance was unreasonable under prevailing professional norms and was not the product of sound trial strategy. *See id.* at 688-89. Judicial scrutiny of counsel's performance is highly deferential, and thus we must evaluate Schick's conduct from his perspective at the time it occurred, without the benefit of hindsight. *Id.* at 689. "[S]trategic choices made after thorough investigation of [the relevant] law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690. However, strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations

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9. The district court held that Schick's performance was deficient and the dissent does not dispute this holding. Instead, our colleague argues that Belmontes was not prejudiced by Schick's performance. His dissent notes that courts need not determine whether counsel's performance was deficient before deciding whether it prejudiced the defendant. Dis. Op. at 6819. We agree and because all of the dissent's arguments pertain to the prejudice section of the ineffective assistance of counsel analysis, we will address them in that section of the opinion.

unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances . . . .

Id. at 690-91; *see also Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 690-91). Similarly, a decision not to present a particular defense or not to offer particular mitigating evidence is unreasonable unless counsel has explored the issue sufficiently to discover the facts that might be relevant to his making an informed decision. *Wiggins*, 539 U.S. at 522-23; *Stankewitz v. Woodford*, 365 F.3d 706, 719 (9th Cir. 2004).

Although the Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead ha[s] emphasized that 'the proper measure of attorney performance remains simply reasonableness under prevailing professional norms,' " *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 688), "general principles have emerged regarding the duties of criminal defense attorneys that inform our view as to the 'objective standard of reasonableness' by which we assess attorney performance, particularly with respect to the duty to investigate," *Summerlin*, 427 F.3d at 629.

[3] Specifically, we have held that " '[t]o perform effectively . . . counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present[ ] and explain[ ] the significance of all the available [mitigating] evidence.'" *Allen v. Woodford*, 395 F.3d 979, 1000 (9th Cir. 2005) (citing *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en banc)); *see also Summerlin*, 427 F.3d at 630. Indeed, " 'it is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase.' " *Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir.

1999) (quoting *Caro*, 165 F.3d 1223, 1227 (9th Cir. 1999)).

[4] Accordingly, attorneys representing defendants in capital sentencing proceedings have "an 'obligation to conduct a thorough investigation of [the defendant's] background.'" *Mayfield*, 270 F.3d at 927. They also have a "'duty to investigate and present mitigating evidence of mental impairment' . . . [,] [which] includes examination of mental health records." *Summerlin*, 427 F.3d at 630 (quoting *Bean v. Calderon*, 163 F.3d 1073, 1080 (9th Cir. 1998) and citing *Deutscher v. Whitley*, 884 F.2d 1152, 1161 (9th Cir. 1989)); *see also Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002). Furthermore, "counsel has an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health." *Caro v. Woodford*, 280 F.3d at 1254. "The defendant's history of drug and alcohol abuse should also be investigated." *Summerlin*, 427 F.3d at 630 (citing *Jennings v. Woodford*, 290 F.3d 1006, 1016-17 (9th Cir. 2002)).

[5] Moreover, "when 'tantalizing indications in the record' suggest that certain mitigating evidence may be available, those leads must be pursued." *Lambright v. Schriro*, 490 F.3d 1103, 1117 (9th Cir. 2007) (quoting *Stankewitz*, 365 F.3d at 719-20); *see also Stankewitz*, 365 F.3d at 754-55 (finding ineffective assistance where counsel failed to thoroughly investigate the defendant's childhood, history of drug abuse, and mental health problems notwithstanding the fact that he was on notice that such an investigation might yield mitigating evidence); *Summerlin*, 427 F.3d at 632 (finding ineffective assistance in a case in which counsel failed to obtain readily available evidence concerning possible mental state mitigation where his client's prior attorney told him there were indications that the defendant was mentally ill); *Mayfield*, 270 F.3d at 928 (finding ineffective

assistance where counsel did not consult the appropriate medical experts or collect relevant records after "his investigator's limited efforts revealed evidence of diabetes and substance abuse," and failed to explain to the jury the relevance of the evidence that was presented).

In *Douglas*, for example, we held that petitioner's trial counsel had been ineffective because he failed to adequately investigate and present evidence related to Douglas's traumatic childhood, positive attributes, and mental health problems, and failed to adequately prepare several lay witnesses for their testimony at the penalty phase of Douglas's capital trial. 316 F.3d at 1088-89. Douglas was convicted of sexually assaulting, torturing, and brutally murdering two teenage girls, and the State sought the death penalty. *Id.* at 1084. At the penalty phase of his trial, Douglas's counsel presented the testimony of Douglas's wife, his son, a friend, and a neighbor.

Id. at 1084. Two of these witnesses

> testified that Douglas had an aversion to the sight of blood and several testified as to his nonviolent nature, in an apparent attempt to focus on "lingering doubt" of whether [a cooperating witness's] story was completely true. . . . [Douglas's] family members testified in very general terms that Douglas had been orphaned and had a difficult childhood, running away from home at fifteen to join the Marines. They also indicated that Douglas was very poor growing up. . . .

Id. at 1087. Evidence presented to the district court at the evidentiary hearing on Douglas's ineffective assistance of counsel claim demonstrated that, although trial counsel was "on notice that Douglas had a particularly difficult

childhood, . . . [he made] no attempt to contact persons who might have had more detailed information about Douglas's past." *Id.* at 1088.

Even though counsel "knew that Douglas had spent a great deal of time locked in a closet [as a child], a factor which contributed to his severe claustrophobia, [counsel] did not elicit any testimony regarding this fact from Douglas's family." *Id.* Moreover, although it was "easy to ascertain that Douglas's line of work exposed him to toxic solvents, . . . [counsel] did not investigate the effects of this exposure or inform the mental health experts who [he hired to evaluate] Douglas of this fact." *Id.* at 1088-89. Finally, counsel "spent virtually no time preparing [his] witnesses for their testimony at the penalty phase." *Id.* at 1087. His failure to do so "meant that the testimony that was introduced was less than compelling." *Id.* at 1088.

Assessing counsel's mitigation investigation and preparation for the penalty phase under the standards set forth above, this court concluded that

> although [counsel] did perform some investigation, it was constitutionally inadequate. The information [counsel] did obtain about Douglas's troubled childhood revealed the need to dig deeper, and he did not adequately prepare the witnesses in order to present the material he did gather to the jury in a sufficiently detailed and sympathetic manner. We therefore conclude that [counsel's] investigation and presentation of social history at the penalty phase was deficient.

Id. at 1089.

The facts of the case at hand and those in Douglas are

quite similar.[10] Here, as in *Douglas*, Schick failed to consult with experts and adequately investigate obvious leads in the record that would have led him to mitigating evidence about Belmontes's mental state, humanizing evidence about his traumatic childhood, and positive character evidence. Also as in *Douglas*, Schick failed to prepare lay witnesses to effectively present character evidence about Belmontes that would inform the jury of his positive qualities. Finally, as in *Douglas*, Schick failed to present expert witnesses who could testify about Belmontes's mental state and explain the significance of the mitigating evidence to the jury. Each of these failures were unreasonable under professional norms and independently constitute deficient performance.

First, Schick failed to consult experts and otherwise adequately investigate mitigating evidence for the penalty phase, notwithstanding the fact that he knew such evidence potentially existed. Although Schick hired a mental health expert, Dr. Cavanaugh, to evaluate Belmontes for purposes of the guilt phase, he did not, as the district court found, ask Dr. Cavanaugh to comment on any issues relevant to the penalty phase, and did not consult any other psychologist or psychiatrist with respect to the relevance of, or need for further development of the mitigating evidence regarding Belmontes's troubled childhood or mental state. Obtaining competency evaluations from mental health experts for guilt phase purposes does not discharge counsel's duty to consult such experts for the penalty phase because the considerations involved are very different in the two phases. *See Summerlin*, 427 F.3d at 642. This failure to

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10. The dissent attempts to distinguish the two cases, but its analysis is limited to the issue of prejudice. Dis. Op. at 6838-39. In this section, however, we consider only the issue of deficient performance and the dissent does not dispute our analysis. We discuss prejudice below.

consult a psychologist or psychiatrist about the significance of the mitigating evidence would have been unreasonable in any capital case, but was particularly unreasonable here, given the information Schick had at the time he made this decision. First, Dr. Cavanaugh's report indicated a "lack of early markers" of anti-social personality disorder. Had Schick bothered to ask what this meant, he would have realized that this finding would strongly support the argument that Belmontes's adverse experiences in his early teens changed his life and his personality from that of a normal, well-behaved young man to that of a disturbed, depressed, and drug addicted nineteen year old, an argument that Schick failed to make, but one that, if properly developed, might well have humanized Belmontes and elicited the sympathy of members of the jury. Second, Cavanaugh's report mentioned that Belmontes had an extensive history of substance abuse, and that his use of drugs and alcohol negatively affected his impulse control. A reasonable attorney presented with this information would have consulted with Cavanaugh or another potential expert regarding whether such a finding, though unhelpful at the guilt phase, might be useful at the penalty phase either to explain how Belmontes's harmful youthful experiences may have led to his turning to substance abuse to help him cope with the trauma in his life or to describe how those experiences when coupled with the related substance abuse may have contributed to Belmontes's criminal conduct.[11]

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11. Contrary to the dissent's suggestion, we do not hold that Schick could have or should have presented an expert who would testify that substance abuse led Belmontes to lose control of his impulses and murder McConnell. Rather, we hold that Schick's failure to investigate Belmontes's mental state and history of substance abuse constituted deficient performance. The dissent confuses the failure to *investigate* evidence with the prejudice that would follow from failing to *introduce* it. Here, we simply point out Schick's failure to fully investigate Belmontes's mitigating circumstances. We discuss

In addition to failing to consult a psychologist or psychiatrist about the availability of mitigating evidence after reading Cavanaugh's report, Schick failed to pursue a host of other obvious leads, many of which would have caused him to discover significant additional mitigating evidence. Although Schick knew that Belmontes had participated in Cadets, Little League, and team sports, and that he had been a well-behaved and likeable child, Schick did not investigate whether evidence could be presented regarding the positive attributes that Belmontes possessed, evidence that might have humanized him in the eyes of the jurors and given them an affirmative reason to spare his life.

Schick was also aware that Belmontes had suffered from rheumatic fever and other illnesses as an adolescent, and knew that these illnesses had been markedly debilitating and that he had been hospitalized many times, yet he neither sought nor obtained Belmontes's medical or hospital records, nor did he uncover the easily obtainable evidence that Belmontes was told repeatedly that he should expect to die before he reached the age of 21.

Schick knew that Belmontes had dropped out of school in the tenth grade and that he struggled academically, yet Schick did not obtain any of Belmontes's school records or contact any of Bemontes's former teachers, and did no other investigation of this issue. He did not, for example, seek to discover whether Belmontes's conduct in this regard was a result of any of the traumatic events he had experienced. Further, although Schick knew that

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below in the prejudice section the effect of Schick's failure to conduct the proper investigation and obtain the necessary witnesses. In that section, we consider what a reasonably competent attorney would have done with the witnesses and evidence that Schick should have uncovered.

Belmontes was abusing marijuana, PCP, heroin, amphetamines, and LSD around the time of the offense, he did not investigate whether mitigating evidence related to Belmontes's drug use existed or should be introduced.

Schick also knew that psychological testing had been performed on Belmontes by Dr. Yates during his time at the CYA, the results of which were easily obtainable had Schick requested these records. Despite this knowledge, Schick did not obtain a copy of results of the psychological testing, did not discuss Dr. Yates's evaluation of Belmontes with her or with any other psychiatrist or psychologist, and did not seek an independent evaluation of Belmontes's mental health or personality traits for purposes of the penalty phase. Alternatively, Schick was aware that Belmontes's CYA file contained numerous references to the those qualities that made him a good candidate for positive institutional adjustment. Notwithstanding the presence of multiple such leads, Schick did not attempt to obtain any additional information about the incidents of positive conduct described in the CYA file, nor did he discuss with any psychologist or psychiatrist or other potential expert Belmontes's prospects for positive institutional adjustment. Schick's failure to pursue these obvious leads, many of which would have led to the discovery of compelling mitigating evidence, was clearly unreasonable and fell below standards of professional competence extant in 1982. *See Lambright,* 490 F.3d at 1119-20; *Stankewitz*, 365 F.3d at 719-20; *Douglas,* 319 F.3d at 1098; *Bean*, 163 F.3d at 1080. This is especially true given that Schick conceded that his failure was not a result of any tactical or strategic decision on his part and admitted that he simply had not thought of conducting the most rudimentary of investigations regarding Belmontes's mental state.

In addition to failing to investigate adequately, Schick did not effectively prepare the lay witnesses he called to testify.[12] We do not mean to suggest, as the dissent implies, that Schick should have coached the witnesses. However, he had a duty to discuss with them the purpose of their testimony, reveal the type of questions he planned to ask them on the stand, and instruct them as to what kind of information the jury would find helpful and what kind of testimony would not be relevant. It is evident from the testimony given at the penalty phase that Schick did not do this. Several of the witnesses who knew Belmontes best and clearly could have provided compelling mitigating evidence did not testify to a single positive quality he possessed. Instead, witness after witness told the same jury that had just found Belmontes guilty of first degree murder beyond a reasonable doubt, that Belmontes should not receive the death penalty because he was innocent.[13]

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12. Although Schick claimed it was his practice to interview witnesses before their actual testimony, he could not specifically recall interviewing the penalty phase witnesses in this case. There were only three entries in Schick's time log related to penalty phase witness preparation and those time intervals were also spent completing other tasks, including trial preparation, that likely took up the bulk of the minimal number of hours he logged.

13. The dissent makes the untenable claim that the witnesses' belief that Belmontes was innocent had a mitigating effect on the jury. All of the witnesses who testified that they believed he was innocent admitted, of their own volition or at the prodding of the prosecution, that they were not familiar with the facts of the case. (The only exception to this was Belmontes's mother, but it is not significant or surprising that a mother would think her own son incapable of killing another human being). It is far more likely that the jury would interpret the witnesses' insistence on Belmontes's innocence as evidence of their ignorance, or perhaps loyalty, than, as the dissenting opinion suggests, as an indication that "Belmontes was normally not a violent person." Dis. Op. at 6841.

Most glaringly, Belmontes's own mother did not offer a single reason not to execute her son, although she obviously could have done so had she been properly advised regarding the purpose and nature of the inquiry.[14] Belmontes was similarly ill-prepared to testify and to address the jury at the close of the penalty phase. As a result, he could not name a single positive, productive thing he would do if given a life sentence, asked the jury not to rely on the few unconnected pieces of mitigating evidence that Schick somehow managed to adduce,[15] and spent a majority of his closing statement telling the jury that the prosecutor did not know whether he had murdered McConnell because "he wasn't there" and "he doesn't know me."

Schick's presentation of lay witness testimony at the penalty phase failed to fulfill its purpose of humanizing Belmontes or providing the jury with any reason to spare his life. Competent counsel would have met with the lay witnesses, discussed their testimony, and elicited the relevant information from them on the stand. Schick's failure to prepare the lay witnesses and effectively present their testimony constitutes deficient performance. *See Douglas*, 316 F.3d at 1089.

Additionally, Schick failed to call an expert witness who could have synthesized the various elements of the

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14. The dissent notes that Belmontes's mother "told the jury that Belmontes had a close relationship with his sister." Dis. Op. at 6840. This trivial observation was the only positive attribute that Schick managed to extract from the defendant's own mother in the course of her otherwise damaging testimony. Likewise, the rest of the positive testimony from other witnesses that the dissent cites, Dis. Op. at 6840-41, was cursory and overshadowed by the witnesses' repeated and unhelpful insistence that Belmontes was innocent.

15. In his address to the jury, Belmontes insisted that he did not want to use his traumatic childhood experiences as a crutch.

information about Belmontes and explained the factors that led to Belmontes's criminal activity. Such an expert could have explained to the jury that Belmontes was a well-adjusted, likeable child who showed great promise despite his family's instability and poverty. The death of his sister at an early age and subsequent struggle with rheumatic fever, plus the social isolation and depression that accompanied it, however, had profound psychological and social effects on him. An expert could have explained to the jury how such experiences could have led an individual to abuse drugs and alcohol and become involved in criminal activity.

The absence of such an expert was particularly damaging given Schick's failure to explain the significance of the mitigating evidence in his closing statement at the end of the penalty phase. He did not, as noted earlier, even mention any of the evidence that might have humanized Belmontes. He did not refer to any of the traumatic events that helped shape Belmontes's personality and were responsible for transforming him from a p eaceful, likeable child to the disturbed person who murdered Steacy McConnell, and did not attempt to explain the connection between the two. Nor of course did he explain the relevance of the evidence relating to Belmontes's youth and childhood, including his serious illness, to the jury's task of determining whether Belmontes was deserving of a life sentence rather than execution. Although Schick stated in his deposition that one of his four themes at the penalty phase was Belmontes's capacity to adjust well to prison, he failed to argue that such was the import of the testimony of any of the witnesses he had called to testify. *Cf. Mayfield*, 270 F.3d at 928 (finding ineffective assistance in part based on counsel's "fail[ure] to explain to the jury the significance of the mitigating evidence presented"). Instead he said only that Belmontes was ill-equipped to make it outside

of prison. Perhaps as detrimental as these glaring omissions were the arguments that Schick did make to the jury. Indeed, the main thrust of his closing was the perverse argument that, if the jurors really despised his client, they should sentence him to life in prison rather than death because death would be the more "lenient" punishment.

[6] In sum, the record makes plain that Schick's presentation of evidence at the penalty phase did not take place after " 'all relevant mitigation information [was] unearthed for consideration,' " *Douglas*, 316 F.3d at 1088 (quoting *Caro*, 165 F.3d at 1227). Instead, Schick ignored "tantalizing indications in the record . . . that 'would [have] le[ ]d a reasonable attorney to investigate further.' " *Stankewitz*, 365 F.3d at 720 (quoting *Wiggins*, 539 U.S. at 527). As a result, substantial evidence in mitigation that might have humanized Belmontes and affected the outcome of the penalty phase proceeding was not provided to the jury. Compounding his failure to investigate, Schick then failed to adequately prepare his witnesses to testify with the result that their testimony was unhelpful and possibly even damaging. Furthermore, he failed to present an expert to explain the relevance of the available mitigating evidence to the jury. Remarkably, he also failed to explain to the jury in his closing argument the relevance of the small quantum of mitigating evidence he did introduce, and failed to make any of the critical humanizing arguments that might influence a jury in the case of a nineteen-year-old youth.

Instead, he relied principally on the unsympathetic and not very credible argument that a life sentence is harsher punishment than execution. *Cf. Douglas*, 316 F.3d at 1088-89; *Mayfield*, 270 F.3d at 928. Such representation falls far below that which a reasonably competent attorney would provide in a capital case. Accordingly, we

affirm the district court's holding that Schick's representation at the penalty phase of Belmontes's trial was deficient.

b. Prejudice

i. Legal framework

To establish prejudice, Belmontes must demonstrate that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is one " 'sufficient to undermine confidence in the outcome,'" but is "less than the preponderance more-likelythan-not standard." *Summerlin*, 427 F.3d at 640, 643 (quoting and citing *Strickland*, 466 U.S. at 693-94). Accordingly, "[i]n establishing prejudice under *Strickland*, it is not necessary for the habeas petitioner to demonstrate that the newly presented mitigation evidence would necessarily overcome the aggravating circumstances." *Correll v. Ryan*, 465 F.3d 1006, 1018 (9th Cir. 2006) (citing *Williams v. Taylor*, 529 U.S. 362, 398 (2000)); *see also Rompilla v. Beard*, 545 U.S. 374, 393 (2005) ("[A]lthough we suppose it is possible that [the sentencer] could have heard it all and still have decided on the death penalty, that is not the test."). Instead, in evaluating prejudice, we must "compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently," *Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995), and evaluate whether the difference between what was presented and what could have been presented is sufficient to "undermine confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 694. Prejudice is established if "there is a reasonable probability that at least one juror would have struck a different balance"

between life and death. *Wiggins*, 539 U.S. at 537.

[7] Applying these standards, we have held that counsel's failure to investigate and present available evidence regarding a capital defendant's troubled childhood, physical illness, mental state, and drug use is sufficient to undermine confidence in the result of a sentencing proceeding, and thereby to render counsel's performance prejudicial. *See, e.g., Douglas,* 316 F.3d at 1089; *Mayfield,* 270 F.3d at 932; *Ainsworth v. Woodford*, 268 F.3d 868, 878 (9th Cir. 2001); *Smith v. Stewart*, 140 F.3d 1263, 1271 (9th Cir. 1998). We have likewise found prejudice based on counsel's failure to adequately prepare and present the mitigating evidence that he introduces, and to adequately explain to the jury the relevance of that mitigating evidence. *See Lambright,* 490 F.3d at 1122-23; *Douglas*, 316 F.3d at 1088-89; *Mayfield*, 270 F.3d at 928.

ii. *Lay witnesses*

[8] As a result of Schick's deficient performance, the jury never heard much of the available lay witness testimony about significant mitigating circumstances of Belmontes's life including his difficult childhood, serious physical illness, drug abuse, and positive attributes. Specifically, in addition to presenting evidence demonstrating that Belmontes was born to a teenage mother and grew up in a poverty-stricken family in which his father, an alcoholic, beat his mother severely and regularly, Schick could have introduced substantial additional mitigating evidence. He could have established through the testimony of lay witnesses that Belmontes had to deal with a host of other traumas and adversity during his childhood and adolescence. Such mitigating evidence serves to humanize the defendant and is critical in the determination of whether a jury should spare the defendant's life. *See Penry v. Lynaugh*, 492 U.S. 302, 319

(1989) (holding that the purpose of mitigating evidence is to ensure that the jury "treat[s] the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence" (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)) *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002)); *Mak v. Blodgett*, 970 F.2d 614, 619 (9th Cir. 1992) ("The sentencing hearing is defense counsel's chance to show the jury that the defendant, despite the crime, is worth saving as a human being.").

Schick failed to call witnesses to testify that when Belmontes was five years old, his 10-month-old sister died of a brain tumor. After her death, Belmontes exhibited symptoms of depression and would repeatedly visit the cemetery where his sister had been buried. Belmontes also suffered as a result of his maternal grandmother's alcoholism and prescription drug addiction, which, in combination with her manipulative and controlling behavior, caused constant strife within both his immediate and extended family. Schick could also have introduced testimony about Belmontes's positive attributes and strong character as a child in the face of adversity; he was a kind, responsible, and likeable child who got along well with his siblings, was respectful towards his grandparents despite their disapproval of his mixed racial background, participated in community activities, kept up in school and got along with his teachers before his illness, and made friends easily.[16]

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16. The dissent suggests that such positive testimony about Belmontes's character as a child would not be forthcoming and points to old reports in which police and probation officers made negative comments about Belmontes in his late teens after he became involved in criminal conduct. Dis. Op. at 6836 n.21. We first note that those officials came into contact with Belmontes long after the psychological and social effects of his illness and family trauma manifested themselves. The positive character evidence to which we

Other humanizing evidence that lay witnesses could have presented includes Belmontes's debilitating struggle with rheumatic fever that left him isolated from his peers and depressed and his family's period of wholly inadequate living conditions—a single room in a cheap motel where his mother frequently had sex with various men.[17] Additionally, Schick could have presented

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refer is the testimony of those who knew Belmontes as a child and could speak to his promising character in the face of poverty and family violence. Second, it is unlikely that police and probation officers would be the best source for positive reports about an individual who came to their attention after committing a crime—no matter how minor. In short, it makes little sense to contend that negative evidence of Belmontes's character found in police interviews and probation officer reports somehow undermines testimony about Belmontes's strong character as a child long before he became involved with the criminal justice system.

17. The dissent attempts to downplay the severity of Belmontes's illness, family trauma, and living conditions. In response to overwhelming evidence of an unstable and unhappy family life, the dissent attempts to show that there were "positive aspects of Belmontes's family relationships." Dis. Op. at 6832. The only "positive aspect" of his family life that the dissent can actually point to, however, is the account given by Belmontes's surviving sister, who did *not* testify at trial, of the Sundays that the Belmontes children would spend with their father after their parents' separation. *Id.* Despite the dissent's characterization of her memory of these days as "positive," her testimony is neutral at best. The relevant portion of her declaration states: "My father drank a lot and had a very strong personality. I was about five years old when my parents separated. My father came to pick us up on Sundays, and he took us for rides or to our paternal grandmother's house. We spent the whole day together, but we never did much because he never had any money."

The dissent also downplays the effect of Belmontes's illness by quoting Belmontes's sister's declaration in which she states that she did not "notice or understand emotional changes in him" due to rheumatic fever. Dis. Op. at 6833. Conveniently absent from the dissent is Belmontes's sister's explanation of why she did not "notice

testimony about how these tragic circumstances led him to engage in regular drug use beginning when he was in his early teens. By the time of McConnell's murder—indeed earlier than then—he was regularly using marijuana, heroin, LSD, PCP and other drugs, to help cope with the unpleasant circumstances of his life.[18]

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or understand" the changes in Belmontes—she was very young when he became ill. Belmontes's sister's childhood recollection of her brother's behavior after his bout with rheumatic fever, which she qualified with a reference to her young age, hardly undermines the rest of the strong evidence in the record that the illness had a profound effect on Belmontes.

Finally, the dissent claims that Belmontes did not stay at the motel very often in an attempt to minimize the evidence about Belmontes's wretched living conditions. Dis. Op. at 6833. If anything, this statement casts Belmontes's living situation in a *more* sympathetic light. The only place that Belmontes could call home during his teenage years was one motel room shared by five people so he was forced to sacrifice a stable home life and find shelter in other places. Additionally, the record reflects that one reason that Belmontes did not stay at the motel was that his own mother used to lock him out of the room, probably while she was engaged in sexual encounters with strangers.

18. We do not suggest that Belmontes was under the influence of drugs during the commission of the murder. Nor do we suggest, as the dissent claims, that Schick should have presented expert mental state evidence that Belmontes was less culpable for the McConnell killing because he was under the influence of drugs when he killed her. Our point is only that evidence of Belmontes's drug use should have been presented to humanize him by showing how the tragic circumstances he experienced while growing up adversely affected him. Just as Belmontes's criminal activity was a manifestation of the trauma he suffered during his difficult childhood, so too was his drug use. For example, Murillo, Belmontes's ex-girlfriend, could have testified that Belmontes engaged in risky behavior such as drug use out of hopelessness because he thought that he was going to die young. The mitigating evidence need not have any connection whatsoever to the crime in order to be relevant and humanizing. *See Tennard v. Dretke*, 542 U.S. 274, 287-88 (2004); *Smith v. Stewart*, 140 F.3d 1263, 1271 (9th Cir. 1998). Although the district court held that if Belmontes had attempted to present expert testimony that

Of all the available mitigating evidence described above, the jury heard only that Belmontes's father was a violent alcoholic, that the family was poor, that Belmontes became a born-again Christian while incarcerated, and that at the same time he went from last man to number two man in the Pine Grove fire brigade. The jury never heard testimony about the traumas that Belmontes faced as a youth; it never heard that he possessed many positive attributes, and it never heard that he had struggled with substance abuse since his early teens.

In *Mayfield*, this court held that if the jury had heard the testimony "of available friends and family members relating additional humanizing stories," about the defendant's good character and the difficulties he faced as a youth, which changed his personality and led him to substance abuse and crime, "there is a reasonable probability that the omitted evidence would have changed the conclusion." 270 F.3d at 932 (quoting *Strickland*, 466 U.S. at 700) (internal quotation marks omitted). Likewise, if the jury had considered the additional humanizing evidence that Schick could and should have presented through lay witness testimony in this case, there is a reasonable probability that the jury would have come to a different conclusion about Belmontes's sentence. Accordingly, the district court's conclusion that Belmontes was not prejudiced by counsel's performance because "Schick introduced testimony as to most of the factual matters" that Belmontes argues should have been presented is clearly erroneous; it is also inconsistent with

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drugs influenced his behavior *at the time of the crime*, the rebuttal evidence about Belmontes's role in the murder of another individual, Jerry Howard, would have been admissible to prove that he was capable of committing murder when he was sober, the district court did not hold that humanizing evidence about Belmontes's history of substance abuse before the crime would likewise open the door to additional aggravating evidence.

our law. Indeed, as noted above, the jury heard testimony as to only a few of the numerous adverse experiences that Belmontes had suffered as a youth, heard nothing about their effect on him, and heard almost nothing about his positive attributes. As we have often noted, the fact that a capital jury was presented with a cursory or incomplete presentation of the mitigating circumstances that should have been more thoroughly and fully presented does not obviate a finding of prejudice. *See, e.g., Lambright,* 490 F.3d at 1125-26 (finding deficient performance and prejudice notwithstanding the fact that some information about various mitigating factors was before the sentencing court); *Correll*, 465 F.3d at 1015, n.5 (finding deficient performance and prejudice in spite of the fact that "the bare facts of [petitioner]'s troubled past were . . .presented to the court"); *Stankewitz,* 365 F.3d at 1090 (finding deficient performance and prejudice when counsel presented some mitigating evidence but "a more complete presentation, including even a fraction of the details [defendant] now alleges, could have made a difference"); *Douglas*, 316 F.3d at 1088 (finding deficient performance and prejudice where counsel "introduce[d] some of [the petitioner's] social history, [but] did so in a cursory manner that was not particularly useful or compelling"). To the contrary, only where counsel sufficiently presents available mitigating evidence, or where he has a reasonable strategic reason for not doing so, can we have confidence in the outcome of a jury's penalty deliberations. Neither is the case here. If the jury had heard even a portion of the available humanizing lay testimony, it is likely that at least one juror would have chosen to spare Belmontes's life.

[9] In addition to being prejudiced by Schick's failure to present readily available and compelling mitigating evidence through lay witness testimony, Belmontes was also prejudiced by Schick's failure to adequately prepare

the witnesses who offered the minimal evidence that he did introduce. As noted above, Schick's failure to prepare his lay witnesses resulted in a conspicuous absence of testimony both about the difficulties
Belmontes encountered as a child and about his positive qualities—even from witnesses who knew him best, including his mother. Instead, the witnesses Schick produced insisted that Belmontes was innocent to the same jury that had just found him guilty of first degree murder beyond a reasonable doubt. Similarly, because Belmontes was not adequately prepared to address the jury, he could not name a single positive or productive thing he would do in prison if given a life sentence, and spent the majority of his closing statement telling the jury that the prosecutor did not know whether he had murdered McConnell because "he wasn't there" and "he doesn't know me." He also asked the jury to disregard the few mitigating pieces of evidence that Schick somehow managed to introduce into evidence. At the habeas hearing, Mr. Larsen and Mr. Margolin asserted that these sorts of blunders severely undermined the force of the mitigating witnesses' testimony, and may have even created a negative backlash amongst the jurors. Specifically, they concluded that the fact that several witnesses explicitly rejected the jury's guilty verdict may have antagonized it, and the fact that even Belmontes's own family members could not speak to his redeeming qualities may have led the jurors to believe that there was nothing positive to say about him. Thus, Schick's failure to adequately prepare Belmontes and the witnesses appearing on his behalf resulted in testimony that was unhelpful, and likely even harmful. This also undermines our confidence in the outcome of the jury's penalty deliberations.

Moreover, in the absence of expert testimony, it is especially important that counsel explain adequately to

the jurors the significance of the mitigating evidence in his closing argument. Indeed, this court has held that "[t]o perform effectively in the penalty phase of a capital case, counsel must . . . engage in sufficient preparation to be able to 'present[ ] and *explain[ ] the significance* of all the available mitigating evidence.' " *Allen*, 395 F.3d at 1000 (*citing Mayfield*, 270 F.3d at 927 (en banc)) (emphasis added). Schick did not explain the mitigating evidence to the jury in his closing argument at all. He did not even mention the relevant mitigating circumstances, let alone suggest any connection between the traumatic events that occurred in Belmontes's childhood and his later behavior. Without expert testimony to make that connection for the jurors, Schick had an even greater obligation to do so himself. Defense counsel's failure to give a thorough and persuasive closing argument can prejudice the defendant, especially when, as here, the closing argument is the only opportunity for counsel to compensate for deficiencies in the presentation of evidence. *See Pizzuto v. Arave*, 385 F.3d 1247, 1259-61 (9th Cir. 2004) (holding that counsel's failure to remind the jury of relevant evidence from the guilt phase in his penalty phase closing arguments prejudiced the defendant). Schick squandered his closing argument. Instead of explaining why the jury should vote for a life sentence rather than capital punishment, he argued that a life sentence constituted harsher punishment than the sentence of death. The district court simply "misremembered" the facts or misunderstood the law when it concluded that the jury did not need professional help "beyond defense counsel's argument" to understand Belmontes's mitigating evidence. There was no such argument, notwithstanding counsel's obligation to present it.

[10] On the basis of Schick's failure to prepare and present available lay witness testimony humanizing

Belmontes and his failure to explain the significance of the little humanizing evidence he actually presented to the jury, we conclude that Belmontes was prejudiced by his counsel's deficient performance, that our confidence in the verdict is undermined and that, accordingly, his death sentence must be set aside.

iii. Expert Witnesses

[11] In addition, although the failure here is not essential to our conclusion, Belmontes argues and we agree that Schick failed to provide the jury with expert testimony that would have explained the significance of, and elaborated upon, both the lay testimony that was presented and the lay testimony that should have been presented. Specifically, in addition to presenting the evidence described above, Schick should have offered the testimony of a psychologist or psychiatrist in order effectively to explain to the jury in day-to-day terms the practical impact on an individual of the kind of traumas that Belmontes experienced as a child and adolescent. Such an expert could have explained to the jury the psychological impact ona child of his father's serious alcoholism, of witnessing severe domestic violence between his parents, of his family's poverty, of his mother's humiliating sexual performances, of being severely ill during a critical stage in his social development, of his depressive reactions to being told he would not live past 21, and of his history of substance abuse. Such an expert also could have explained the extent to which these problems can cause or contribute to a change in individuals that can lead to subsequent criminal conduct.

The deposition testimony of Dr. Missett, which Belmontes submitted to the district court, reveals that expert testimony likely would have provided an additional reason to conclude that he received ineffective assistance of counsel. Dr. Missett testified that, prior to the onset of rheumatic fever, Belmontes was functioning well compared to children with similar histories, a fact that suggests that Belmontes possesses positive and conforming core personality traits. Dr. Missett further testified that, "had [Belmontes] been able to continue to

capitalizeon [these] assets . . . the expectation is that would have had a rather good prognosis for his life." However, his rheumatic fever and the resulting social isolation "intensified [his] sense of himself as defective, something from which he never recovered . . . after that." According to Dr. Missett, this in turn led to Belmontes's depression, susceptibility to peer pressure, substance abuse problems,[19] and his eventual involvement in criminal activity.

A lay juror is not trained to identify the specific psychological and behavioral consequences of the traumas that Belmontes experienced. This is particularly true with respect to the consequences of Belmontes's bout with rheumatic fever and his subsequent history of substance abuse. Accordingly, expert testimony should have been presented with respect to these issues. *See Mayfield*, 270 F.3d at 932 (finding prejudice in part based on the fact that the jury did not have the opportunity to "consider[ ] the testimony of experts in endocrinology and toxicology" who could have explained the impact of the defendant's struggle with diabetes and use of drugs); *Douglas*, 316 F.3d at 1090 (finding prejudice in part based on the fact

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19. The dissent agrees that evidence of Belmontes's pattern of self medication through drug use following his illness and social isolation would have elicited sympathy from the jury. Dis. Op. at 6830. The dissent contends, however, that such testimony would open the door to rebuttal evidence that Belmontes was actually a drug dealer. *Id.* However, the slim evidence that the dissent references would not have undermined the jury's sympathy. According to the police report that the dissent cites, an informant approached the Ontario police and stated that he could get Belmontes to buy heroin for him. The police gave the informant $24 and surveilled the transaction. The informant gave Belmontes the money and Belmontes brought him to a residence where he knew that heroin could be procured, purchased a small amount of heroin, and gave it to the informant. Although this transaction technically constituted a sale of drugs, it hardly qualifies Belmontes as a drug dealer.

that counsel's argument that petitioner's troubled past had "created a 'demon' within him lacked force without some expert testimony to back it up."); *Caro*, 280 F.3d at 1258 (finding prejudice in part based on the fact that "the jury was not afforded the benefit of expert testimony explaining the effects that Caro's physiological defects would have on his behavior"). The jury never heard a credible expert like Dr. Missett testify about the impact on an individual of the kind of childhood traumas that Belmontes suffered or explain that involvement in criminal activity can sometimes be explained by the hardships an individual experienced as a youth. Even if such testimony would not have diminished Belmontes's culpability as a legal matter, it would have humanized him in the eyes of the jurors and allowed them to view him as an individual deserving of sympathy and mercy. Thus, Belmontes was also prejudiced as a result of Schick's failure to present expert testimony at the penalty phase, and such failure provides an independent ground for setting aside the death penalty.[20]

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20. The State does not assert on appeal that the type of expert testimony discussed in this section would open the door to the aggravating evidence of Belmontes's prior alleged criminal conduct, specifically that Belmontes committed an act of murder with regard to Jerry Howard. It argues only that the expert testimony about Belmontes's *potential for institutional adjustment* could lead to the admission of such evidence. (We deal with the separate issue of institutional adjustment in section II.B.2.c. *infra*.) The dissent, unlike the State, argues, however, that evidence regarding Howard's death would be admissible to test the basis for any expert opinion regarding Belmontes, including testimony as to the effect of childhood traumas upon future behaviors. Dis. Op. at 6823-24. We need not reach that question, however, a) because the State does not raise it on appeal, and b) because Schick's failure to present mitigating evidence from lay witnesses and to explain the relevance of such evidence to the jury provides a sufficient basis for reversal of his capital sentence. Even were we to reach the question whether the calling of an expert regarding childhood traumas and their effect would open the door to evidence regarding Howard, we would

conclude that it would not. Obviously, the expert would know about the instant murder, and thus understand the gravity of Belmontes's criminal conduct. However, an expert's opinion as to whether a set of circumstances during an individual's period of emotional development could lead to serious criminal conduct is in no way dependent on whether the defendant committed one or two murders or even on whether he committed any. The critical testimony from an expert is that as a matter of psychological experience and knowledge, certain childhood traumas can result in a person's becoming likely to engage in subsequent criminal conduct, not that they always do and not that they necessarily did in the particular case before the jury. There would be no basis for suggesting that such a professional opinion would be any different if the expert were informed that Belmontes committed two murders rather than one. Further, if the prosecutor had argued that he would be entitled to offer into evidence his version of the Jerry Howard murder in connection with the expert testimony that Schick intended to present, that argument would most likely have been rejected by the court. Any decision to admit such evidence would have been at the discretion of the trial judge, who had found the Howard testimony generally inadmissible. Had there been any doubt, Schick could have determined the answer in advance by means of a motion in limine, and then decided whether or not to introduce the expert testimony, which would not in any event have been essential to Belmontes's defense had Schick presented sufficient lay testimony humanizing him. The dissent also argues that a more effective mitigation presentation would also have opened the door to evidence that Belmontes was involved in a gang. The evidence of this alleged gang affiliation is slim at best. The only relevant portion of the record that the dissent can cite is a CYA document discussing an interview with detectives at the Ontario Police Department in which they stated that there were "rumors" that Belmontes was in the Black Angels gang. Also reported in that document but not mentioned by the dissent, however, is Belmontes's denial of any gang involvement and his mother's claim that Belmontes knew members of the Black Angels gang because they lived in the area, but that he was not a member of the gang. According to Belmontes's childhood friend, Belmontes was part of a "junior gang" loosely affiliated with the Black Angels, but this "gang's" activities did not amount to anything more than harmless pranks. As the dissent acknowledges, Belmontes's "gang affiliation" likely can be explained by peer pressure combined with his sense of inferiority and social isolation in his mostly white school, not by a criminal personality. *See* Dis.

iv. Other relevant considerations

Other considerations also make plain that Belmontes was prejudiced by Schick's deficient performance. The jury was required to weigh the aggravating evidence against the mitigating evidence and it could impose a sentence of death only if the aggravating evidence outweighed the mitigating evidence. The State conceded at oral argument that the evidence in aggravation introduced at Belmontes's trial was "scant."[21] This acknowledgment is consistent with our previous observation that the aggravating evidence presented by the prosecution was "minimal." *Belmontes II*, 414 F.3d at 1106. The district court also held that "the aggravating evidence actually presented to the jury did not make this a clear-cut case for application of the death penalty." With such minimal aggravating evidence, the presentation of more substantial mitigating evidence clearly could have tipped the balance and changed the result of the jury's penalty deliberations. The dissent repeatedly quotes the

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Op. at 6831-32.

21. The dissent accuses us of taking this word out of context and claims that the State used the word "scant" to describe the aggravating factors "*other than the circumstances of the crime*." Dis. Op. at 6834. Our learned colleague is not correct. In the thirty-fourth minute of oral argument, the State declared that "we know here that the jury did in fact find death to be an appropriate punishment based on the scant aggravation that they were given here." It did not distinguish between the circumstances of the crime and the other aggravating evidence. Indeed, it went on to contrast the totality of the "scant" aggravating evidence that the jury *actually heard* with the aggravating evidence they *would have heard* if the evidence about Belmontes's involvement in the Jerry Howard murder had been admitted. Of course the State argued that "the death penalty was appropriate," as the dissent claims, Dis. Op. at 6834, but that does not change the fact that it characterized the aggravating evidence, *including* the circumstances of the crime, as "scant."

California Supreme Court's characterization of the aggravating evidence in this case as "overwhelming."[22] Dis. Op. at 6819, 6826, 6833.

Under the State's own argument, however, the only conceivably significant aggravating factor is the circumstances of the murder itself. While all murders are heinous to some degree, Belmontes's crime was not such as ordinarily leads to the imposition of capital punishment, at least where there are significant mitigating circumstances. The crime here did not involve multiple victims, torture, sexual sadism, or needless suffering on the part of the victim. When compared with the murders in many of the cases in which we have held that the defendant was prejudiced by his counsel's failure to adequately investigate and present mitigating evidence at the penalty phase, the circumstances of the crime in this case can hardly be characterized as "simply overwhelming." *See, e.g., Correll*, 465 F.3d at 1015 (finding counsel's failure to sufficiently investigate and present mitigating evidence prejudicial, even though the crime involved three murders and one attempted murder); *Ainsworth*, 268 F.3d at 870-71, 878 (finding such conduct by counsel prejudicial even though the

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22. The dissent's quotation of the California Supreme Court's decision is slightly misleading. The court described the circumstances of the crime as "overwhelming" when it was analyzing whether Belmontes was prejudiced by the erroneous admission of aggravating evidence that on one occasion he slapped his side to indicate that he was carrying a gun. *People v. Belmontes*, 755 P.2d 310, 348 (Cal. 1988). Commission of a murder is certainly "overwhelming" when compared to the incident described above, but that does not mean that the circumstances of the murder that Belmontes committed were "overwhelming" when compared to the circumstances of other capital murders, if only those in which the imposition of the death penalty has been reversed by this court for similar deficient performance on the part of counsel. See text following note.

defendant shot a woman in the hip, raped her as she bled from the gunshot wound, and confined her in her car, at times in the trunk, for 24 hours until she bled to death); *Wallace*, 184 F.3d at 1113, 1118 (9th Cir. 1999) (finding such conduct by counsel could be prejudicial even though the defendant stalked and killed two people and shot without killing two others the same night); Bean, 163 F.3d at 1075-76, 1081, (finding such conduct by counsel prejudicial even though the defendant beat to death one middle-aged and one elderly woman in order to rob them); *Hendricks v. Calderon*, 70 F.3d 1032, 1035, 1045 (9th Cir. 1995) (finding such conduct by counsel prejudicial even though defendant was convicted of shooting two men who paid him to have sex with them and, as the jury heard in rebuttal testimony during the penalty phase, was never charged with murdering three others).[23] Thus, given the circumstances of Belmontes's crime and the almost total absence of any other evidence in aggravation, counsel's failure to produce the significant additional mitigating evidence we have set forth above was without question prejudicial. The prejudicial nature of Schick's deficient representation becomes clear beyond any doubt when one considers the fact that, even when presented with an

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23. The circumstances of Belmontes's crime certainly do not come close to the heinous murders in *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), which the dissent claims is analogous to the present case and on which it principally relies. Campbell forced a woman to engage in acts of sodomy by holding a knife to the throat of her one-year-old daughter. *Campbell*, 829 F.2d at 1456. He was convicted of first degree assault and sodomy after his victim and her neighbor testified against him. *Id.* Years later, when he was on work release, he returned to the victim's home and beat her, strangled her and slashed her throat and the throats of her daughter and the neighbor who testified against him. *Id.* All three bled to death. *Id.* In contrast to the vengeful, premeditated, and sexually violent crimes involving multiple victims at issue in *Campbell*, Belmontes's crime involved only one victim who was killed because she surprised Belmontes and his confederates during a robbery.

incomplete, inadequate, and uncompelling presentation of the potential mitigating evidence, at least some members of the jury, perhaps a majority, had serious doubts during the deliberations as to the correct result. Specifically, the jury took a substantial amount of time to deliberate, and asked questions in the midst of its deliberations that suggested that some jurors were leaning toward a verdict of life without the possibility of parole.[24] Indeed, the jury's question, "Can the *majority* rule on life imprisonment?" suggests that at that point in the deliberation, a number of jurors were leaning toward life imprisonment. (emphasis added). Had counsel better prepared the witnesses to testify, had the jury been presented with the additional mitigating evidence that should have been introduced, and had the significance of that evidence been explained to the jury, there is a reasonable probability that at least some jurors, if not all, would have been persuaded that life without the possibility of parole, rather than death, was the appropriate penalty in this case. *Cf. Mayfield*, 270 F.3d at 932 (finding prejudice in part based on the fact that (1) the jury deliberated for approximately the same amount of time as Belmontes's jury and (2) it questioned the judge regarding unanimity in a similar way to Belmontes's jury). Given the facts regarding deficient performance and the district court's findings in that regard, the nature of the jury's question alone is sufficient to undermine our confidence in the outcome. On the whole, this case is remarkably similar to *Mayfield*. As in *Mayfield*, there are two independent bases on which we can find ineffective counsel at the penalty phase—the failure to present sufficient mitigating evidence through

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24. The jury's deliberations also call into question the dissent's characterization of the aggravating evidence as "overwhelming." If the jury had found the evidence to be so "overwhelming," surely the paltry mitigation case that Schick presented would not have stood in the way of a swift deliberation and imposition of a death sentence.

lay testimony and the failure to provide adequate expert testimony. The evidence that counsel failed to introduce in *Mayfield* is very similar to that which Belmontes's counsel failed to introduce. Additionally, the nature of the jury deliberations in *Mayfield*, as in this case, undermine our confidence in the penalty phase verdict.

In *Mayfield*, the only witness that counsel presented at the penalty phase was Dr. Craig Rath. *Id.* at 928. Although we noted that the mitigation evidence that was presented was "substantial," we held that there was additional evidence that could and should have been offered to humanize Mayfield. Mayfield struggled with diabetes as a child and when he was seventeen his grandmother died, his mother moved the family, and his diabetes-related hospitalizations increased. *Id.* at 931. These "stressors" led him to abuse drugs and alcohol and associate with the wrong crowd. According to the testimony of his family and friends at the evidentiary hearing, Mayfield was once a supportive, generous, cooperative person, but his personality changed as a result of his substance abuse and medical problems. *Id.* at 931-32. We held that if the jury could have heard this humanizing testimony, there is a reasonable probability that it would have come to a different conclusion with respect to Mayfield's sentence. *Id.* at 932. Like Mayfield, Belmontes was a sweet, agreeable child, but his medical problems, social isolation, and substance abuse changed him and eventually led him into criminal activity. Counsel's failure to present lay witness testimony to this effect prejudiced Belmontes just as it prejudiced Mayfield.

Another independent basis for our holding in *Mayfield* was counsel's failure to present expert testimony. At the evidentiary hearing, an endocrinologist testified about the difficulties that diabetics face monitoring and treating

their illness as well as the side effects that Mayfield suffered. *Id.* at 930. Additionally, a psychiatrist testified about the psychological effects of Mayfield's difficult childhood and the increasing stress that he faced that eventually led him to lose control of himself and become involved in drugs and crime. *Id.* at 931. Finally, a toxicologist testified about the effects of PCP—a drug that Mayfield used regularly leading up to the crime. *Id.* We found that if the jury had heard the testimony of these experts, it might have decided to give Mayfield a life sentence rather than the death penalty. *Id.* at 932. As in *Mayfield*, counsel in this case could have presented expert testimony about the effect of childhood traumas on an individual and the way that those traumas can lead to subsequent substance abuse and criminal behavior. As in *Mayfield*, Belmontes was prejudiced by counsel's failure to present such expert testimony.

Moreover, the nature of the jury deliberations in *Mayfield* and in this case reveal the tenuousness of the verdicts. In *Mayfield*, after deliberating for four hours, the jury sent a written question to the judge, which read, "Must all 12 jurors agree for the sentence of life without parole?" *Id.* The judge responded: "All jurors must agree if either verdict is reached." *Id.* The jury deliberated for an additional day before it reached a verdict. *Id.* This is similar to the question that the jurors posed to the judge in this case, although in the present case the jurors asked "Can the majority rule on life imprisonment?" As in *Mayfield*, the jury's question during deliberations undermines our confidence in the verdict. *Id.*

Although the facts in *Mayfield* are very similar to those in the present case, the case for a finding of prejudice in this case is even more compelling. In *Mayfield*, we described the aggravating evidence as "strong." Here, it is, in our words "minimal," or as the State puts it,

"scant." In *Mayfield*, the defendant committed premeditated double homicide, going to the victim's house for the sole purpose of confronting and killing her and then killing a witness to the first murder as a cover-up. Here, by contrast, Belmontes went to the victim's house with the intention of burglarizing her home in the belief that no one was there rather than with the intent to kill.[25] The other aggravating circumstances present in *Mayfield*—that the defendant once carried and fired a gun at the home of one exgirlfriend, and that he had previously physically abused another ex-girlfriend—are not significantly different than the other aggravating circumstances present here. Additionally, in *Mayfield* we found the mitigating evidence that counsel had actually introduced to be "substantial." Here, by contrast, the mitigating evidence Schick presented at trial was insubstantial.

Accordingly, we conclude that *Mayfield* is controlling and

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25. Indeed, the aggravating evidence in *Mayfield* was stronger than all of the possible aggravating evidence that the State could have put on against Belmontes, including the Jerry Howard murder. In *Mayfield*, there was strong evidence that the murders were planned in advance, coolly carried out, and motivated by vengeance. In the present case there was evidence of advance planning of the *robbery*, but the murder happened unexpectedly after the victim surprised Belmontes and his confederates. Belmontes had no advance motive to kill McConnell. Mayfield was convicted of killing two people. Belmontes was convicted of killing one person and alleged to have killed a second in an unrelated incident. Mayfield committed his crime without confederates, whereas Belmontes's culpability is diminished by the presence and influence of his accomplices. Although we hold that there was sufficient mitigating evidence that should have been introduced that, standing alone, would warrant a finding of prejudice, without the introduction of any evidence that could, under any theory, plausible or implausible, serve to open the door to the introduction of the Jerry Howard murder evidence, *Mayfield* would, like a number of other cases cited *supra* in the text, compel a finding of prejudice even if the Jerry Howard evidence were admitted.

that under its reasoning, Belmontes is entitled to relief on his ineffective assistance of counsel claim.

v. Summary

[12] Because the substantial mitigating evidence that counsel failed to uncover and present to the jury would have been highly beneficial to Belmontes, because counsel's failure to adequately prepare the witnesses who did testify rendered their testimony of little value and sometimes counterproductive, because counsel failed in his closing argument to explain to the jury the pertinence of the minimal mitigating evidence that was adduced and instead urged the jurors to return a verdict of life in prison for the reason that it was a harsher punishment than a death sentence, because the aggravating evidence introduced at sentencing was "scant," because the circumstances of Belmontes's crime (the only aggravating factor the State even contends to be substantial) were far less egregious than those in a number of cases in which we have held that deficient performances by counsel prejudiced defendants, because the evidence counsel failed to present would have humanized Belmontes in the eyes of the jury, and because the duration of the jury's deliberations and the questions it asked the judge make plain that in the minds of at least some of the jurors this was a close case in which their verdict was uncertain during a portion of the deliberations, we conclude that Belmontes has established far more than is required to "undermine[ ] . . . confidence in the outcome" of the penalty phase verdict. *See Strickland,* 466 U.S. at 694. Accordingly, we hold that the district court erred in finding that Belmontes was not prejudiced by counsel's deficient performance.

c. Additional Basis for Prejudice

Belmontes argues that there is an additional reason he was prejudiced by Schick's deficient performance: Schick's failure to offer expert testimony with respect to Belmontes's prospects for institutional adjustment. Specifically, Belmontes asserts that Schick could have introduced the testimony of Dr. Yates, who would have testified that "in a situation of high structure and reasonable support"—i.e. prison—Belmontes "would be a low risk for violent behavior." Belmontes also asserts that Schick could have elicited similar, and perhaps even more powerful testimony from a witness such as Gerald Enomoto, the former Director of the California Department of Corrections and current United States Marshal for the Eastern District of California. Enomoto's deposition states that he would have testified that, despite the presence of some negative reports from CYA staff members, as a whole the reports in Belmontes's CYA file show a clear trend of improvement and positive adjustment. Dr. Missett could also have testified that, in his opinion, Belmontes "would have an extraordinarily high likelihood of a good institutional and nonviolent adjustment to a prison setting."

It is to this point that the State's brief is primarily addressed. The State's argument with respect to why the failure to offer this type of expert testimony was not prejudicial is that, had Schick presented such evidence, he would have opened the door for the prosecution to introduce evidence that Belmontes actually committed a deliberate murder of Jerry Howard rather than acted as an accessory after the fact to voluntary manslaughter. The State asserts that had the Howard evidence been introduced, the aggravating factors would have gone from "scant" to "overwhelming." The State does not contest the trial court's ruling that the Howard evidence was barred as a general matter (except for the bare fact of Belmontes's conviction of "accessory after the fact" to

voluntary manslaughter), but argues only that it would be free to introduce the full facts regarding his actual role in the crime in connection with its cross-examination of any of the expert witnesses who testified that he had a non-violent character. It contends specifically that if any experts testified regarding Belmontes's favorable prospects for behaving in a non-violent manner in a structured environment, the prosecution would have had the right to attempt to show that Belmontes was guilty of murdering Jerry Howard and was a more violent person than the witnesses may have thought.[26/] Because we have held above that a) Belmontes has demonstrated that he was prejudiced by Schick's deficient performance because of the failure to call lay witnesses and that he is entitled to have his sentence set aside on that basis alone and b) he is also entitled to a reversal of his sentence because of his counsel's failure to call expert witnesses to testify as to the effect that the various childhood traumas he experienced would have had upon an otherwise normal child, we need not consider whether expert testimony as to Belmontes's ability to adjust to a structured environment would, in fact, have opened the door to the Howard evidence. Nor need we consider what his counsel might or might not have done with respect to the introduction of such testimony had the trial judge indicated that such would be his ruling.[27/]

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26. The dissent seems certain that the prosecution would have been able to prove that Belmontes actually killed Howard. Dis. Op. at 6820. Additionally, after thoroughly describing the evidence that the prosecution proffered, the dissent curiously declares that "Belmontes does not deny the truth of this evidence." Dis. Op. at 6820 Belmontes has had no occasion to admit or deny the truth of this evidence because, despite the State's repeated attempts, the evidence was never held to be admissible.

27. We do not concede, as the dissent claims, that the additional evidence of Belmontes's violent past would have been admissible if Belmontes had presented evidence of institutional adjustment. Dis.

We believe, however, that even if the Howard evidence were admitted, Belmontes would still have been prejudiced by Schick's deficient representation at the penalty phase of his trial. The aggravating evidence, even with the addition of evidence that Belmontes murdered Howard, is not strong enough, in light of the mitigating evidence that could have been adduced, to rule out a sentence of life in prison. Many of our cases in which capital petitioners claimed ineffective assistance of counsel involved multiple murders and we nevertheless found prejudice because of counsel's failure to present sufficient mitigating evidence. *See, e.g., Correll*, 465 F.3d at 1015 (involving three murders and one failed attempted murder); *Mayfield*, 270 F.3d at 920-21, 932 (involving two murders and one attempted murder); *Wallace*, 184 F.3d at 1113, 1118 (involving two murders and two attempted murders); *Bean*, 163 F.3d at 1075-76, 1081 (involving two murders); *Hendricks*, 70 F.3d at 1035, 1045 (9th Cir. 1995) (involving two murders and rebuttal evidence of three additional murders). Had the jury heard the expert testimony regarding the childhood traumas that turned Belmontes from a good-natured child into a troubled, drug-using individual engaged in criminal conduct, the humanizing evidence and the explanation for his change in personality might well have persuaded at least one juror to vote for life in prison whether he had committed one murder or two. We have already held that counsel's deficient performance was prejudicial where the jurors knew of only one murder: We cannot presume that it would be rendered non-prejudicial simply because they were informed of a second.

Op. at 6822. It is far from clear that the trial judge would have issued any such ruling or that if he had done so, Belmontes's attorney would have proceeded to introduce the additional evidence. See discussion at n.20 *supra*.

Our colleague devotes a substantial portion of his dissent to the issue of the Howard murder evidence, as did the State on appeal. However, because we base our decision on Schick's failure to effectively present humanizing lay witness testimony, and it is undisputed that such testimony would not open the door to the Howard murder evidence, the dissent's arguments are irrelevant to our holding. Moreover, the State does not argue that the introduction of expert testimony regarding the relationship between the traumas that Belmontes experienced as a child and his subsequent criminal conduct would have opened the door to the introduction of evidence regarding the Howard matter (and as we have explained, it would not). Thus, the Howard evidence is irrelevant as well to our holding that the failure to introduce expert testimony regarding the nature and effect of Belmontes's childhood traumas is separately and independently prejudicial. Finally, we believe, although we need not so determine, that even if counsel had decided to introduce evidence of Belmontes's prospects for institutional adjustment in the face of a court ruling that such evidence would allow the prosecution to introduce the Howard murder evidence, the structured environment evidence along with the other mitigating evidence that counsel should have introduced, might well have persuaded at least one juror to vote in favor of life without parole, notwithstanding the introduction of the Howard evidence.

C. Evidence of Prior Criminal Misconduct

Belmontes argues that he "was deprived of due process by the introduction of aggravating evidence at the penalty phase, which suggested criminal activity, but which has never previously been adjudicated." We have previously held that consideration of unadjudicated criminal conduct for purposes of sentencing does not violate defendant's

constitutional due process rights. *See United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984).

In his supplemental brief, Belmontes argues that he is now entitled to relief under *Cunningham v. California*, ___ U.S. ___, 127 S.Ct. 856 (2007). This argument likewise fails. In *Cunningham*, the Court held that a sentencing court may not impose a sentence above the statutory maximum based on facts that were not found by a jury or admitted by the defendant. *See id.* at 860. Here, the maximum sentence authorized by the jury's guilt phase verdict was death.

[13] We recognize that capital sentencing is unlike the imposition of all other punishment, and the ordinary rules do not always apply. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty . . . it [can]not be imposed under sentencing procedures that create[ ] a substantial risk that it would be inflicted in an arbitrary and capricious manner."). We need not decide, however, whether the rule regarding the admission of unadjudicated criminal conduct applies to capital cases because Belmontes was not prejudiced by the State's presentation of the comparatively minor occurrences at the penalty phase of his trial. Accordingly, we affirm the district court's denial of relief with respect to this claim.

D. Failure to Instruct the Jury on the Consequences of a Non-Unanimous Verdict

Several hours after the jury began its penalty deliberations, it sent a note to the judge asking, "[w]hat happens if we cannot reach a verdict?" and "[c]an the majority rule on life imprisonment?" The court then

reread to the jury the sentencing instructions it had previously given, which ended with the following statement: "[I]n order to make a determination as to the penalty, all 12 jurors must agree, if you can." Thereafter, the following exchange occurred:

JUROR HAILSTONE:	If we can't, Judge, what happens?
THE COURT:	I can't tell you that.
JUROR WILSON:	That is what we wanted to know.
THE COURT:	Okay. I know what will happen, but I can't tell you what will happen.

[14] Belmontes claims that his due process rights and his right to be free from cruel and unusual punishment were violated by the trial court's refusal to instruct the jurors on the consequences of a hung jury. Despite its intuitive appeal, this argument fails in light of *Jones v. United States*, 527 U.S. 373 (1999), in which the Supreme Court held that "the Eighth Amendment does not require that the jurors be instructed as to the consequences of their failure to agree." *Id.* at 381. The Court's rationale compels the conclusion that due process likewise does not require the giving of such an instruction. Accordingly, we hold that Belmontes's constitutional rights were not violated when the trial judge refused to instruct the jury on the consequences of a failure to reach a unanimous verdict with respect to the penalty. We therefore affirm the district court's denial of relief as to this claim.

E. The Trial Court's Pre-Judgment of Belmontes's Motion to Reduce His Sentence

Under California law, when a jury returns a verdict of death, the trial judge is required to re-weigh the aggravating and mitigating evidence before imposing a judgment and sentence.
Cal. Penal Code § 190.4(e). Here, after the jury reached its verdict with respect to penalty but prior to the hearing mandated by § 190.4(e), the judge sent a letter to all of the members of the jury thanking them for their service and telling them that their "decision is acceptable and shall be followed." Defense counsel objected to the letter on the basis that it suggested that "the Court had made a decision [on the § 190.4(e) motion] prior to fully reviewing and hearing everything that was going to be said." The trial judge responded that his statement in the letter to the jury was "not indicative of the Court having made up its mind nor is it a statement that would forbear any statements, evidence, testimony that would be offered on behalf of Mr. Belmontes. I think the statement was probably made for the therapeutic purpose more than a legal purpose." The California Supreme Court held that the statement in the letter to the jury was "patently improper," but concluded that the judge did thereafter re-weigh the evidence and make an independent determination as to whether the aggravating circumstances outweighed the mitigating circumstances as required under California law. Specifically, the court held that

> [c]onsidering the improper remark in the context of the letter in which it was made, together with the court's credible explanation that it "was made for [a] therapeutic purpose more than a legal purpose," we conclude defendant has not established that the trial judge ultimately failed to make the "independent determination" respecting the appropriateness of the penalty verdict, as he was obliged to do under section 190.4, subdivision (e).

As evidence, it cited the fact that the trial judge did not adopt verbatim the prosecutor's proposed findings of fact and conclusions of law.

The district court held that "the California Supreme Court's conclusion that the trial court did render the required impartial
judgment is entitled to deference as a factual finding," presumably pursuant to the former version of 28 U.S.C. § 2254(d).

Belmontes argues that the California Supreme Court's determination that the trial judge did not prejudge the § 190.4(e) motion is not a factual finding entitled to deference, but rather a determination regarding a mixed question of law and fact. We reject this argument. Whether or not the judge had made up his mind prior to considering Belmontes's memorandum of points and authorities in support of his § 190.4(e) motion is not a mixed question, but is instead a pure question of fact.

Belmontes also argues that the California Supreme Court's
finding is not entitled to deference because the court "conducted no hearing nor did it have a referee conduct any hearing regarding the trial court's conduct. Rather, the trial court [sic] simply reviewed the statements made on the record by the trial court after defense counsel complained about the letter to jurors and reached a conclusion that even though the trial court told jurors that their death sentence would be sustained, the trial court did not really mean it." (emphasis in original).

[15] We agree with the California Supreme Court that the trial judge's assertion in the letter to the jury was exceedingly improper. In addition, we are equally troubled by the judge's subsequent assertion that the

statement in the letter did not in fact reflect his true views—that it was intended simply as juror therapy. A court's representation to the jury should always be truthful. Nevertheless, we hold that the district court did not err in refusing to reverse the California Supreme Court's factual determination that, "[c]onsidering the improper remark in the context of the letter in which it was made, together with the court's credible explanation that it 'was made for [a] therapeutic purpose more than a legal purpose,' . . . [the] defendant has not established that the trial judge ultimately failed to make the 'independent determination' respecting the appropriateness of the penalty verdict." Accordingly, we affirm the district court's rejection of this claim.

III. CONCLUSION

[16] We affirm the district court's ruling that Belmontes received deficient representation at the penalty phase of his trial, but set aside its ruling that he suffered no prejudice as a result. We hold that counsel's failure to introduce adequate lay witness testimony regarding Belmontes's childhood experiences and his failure to explain to the jury the consequences of the minimal mitigating evidence he did introduce was prejudicial, especially in light of the scant aggravating evidence and the uncertainty the jury indicated about the sentence it should impose. We also hold that counsel's failure to introduce expert witnesses to testify to the relationship of the type of childhood traumas suffered by Belmontes to future criminal conduct, and thus to offer important mitigating expert testimony was prejudicial and thus provides a separate and independent basis for reversal, again especially in light of the circumstances referred to above. Accordingly, we remand to the district

court with instructions to grant the petition for writ of habeas corpus and to return the case to the San Joaquin County Superior Court to reduce Belmontes's sentence to life without parole, unless the State pursues a new sentencing proceeding within a reasonable amount of time, as determined by the district court.

REVERSED and REMANDED.

O'SCANNLAIN, Circuit Judge, dissenting:

> [Fernando Belmontes] was convicted on extremely strong evidence that he committed an intentional murder of extraordinary brutality. He bludgeoned McConnell to death with an iron dumbbell bar; the force of the 15 to 20 some-odd blows leaving her with gaping wounds and a cracked skull. Her defensive wounds plainly evidenced a desperate struggle for life at defendant's hands. The murder occurred in the course of a calculated plan to burglarize the victim's home; to which defendant had gained entry on false pretenses. After the murder, defendant and his accomplices callously fenced the victim's stereo components for $100—purchasing beer with a portion of the proceeds.

People v. Belmontes, 755 P.2d 310, 354 (Cal. 1988).

In the penalty phase of his trial in state court, the jury considered the circumstances of Belmontes's crime and the other aggravating evidence, balanced the evidence against the mitigating factors, and sentenced Belmontes to death.[1] Unanimously affirming Belmontes's conviction

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1. California law requires the trier of fact to consider eleven factors in the penalty phase, insofar as they are relevant: (a) the

and sentence, the California Supreme Court stated: "The properly admitted aggravating evidence in this case—in particular, the circumstances of the crime—was *simply overwhelming*."[2/] *Id.* at 809 (citation omitted and emphasis added).

Now our court orders grant of habeas, faulting the state jury's verdict on grounds of ineffective assistance of counsel. Recharacterizing the aggravating evidence as "minimal," the majority claims that Belmontes was prejudiced by his counsel's failure to present certain available mitigating evidence to counterbalance the aggravating evidence presented by the state. Maj. Op. at 6745. The majority also concludes that Belmontes's counsel failed to prepare adequately the penalty phase witnesses. In order to discern prejudice, the majority overstates the mitigating evidence, understates the properly admitted aggravating evidence, and ignores the further aggravating evidence that would have come in on rebuttal. With all due respect, I must dissent.

I

A

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circumstances of the crime, (b) the defendant's use, attempted use, or threat of force, (c) the defendant's prior felony convictions, (d) the defendant's extreme mental or emotional disturbance, (e) the victim's participation or consent, (f) the defendant's reasonable belief that his actions were morally justified or extenuated, (g) the defendant's extreme duress or substantial domination by another person, (h) the defendant's mental disease or defect, or the effects of intoxication (i) the defendant's age, (j) the defendant's minor role, and (k) "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal. Penal Code § 190.3.

2. Appellate counsel for Belmontes, in contrast, considers the crime "objectively low on the scale of heinousness."

To prevail on an ineffective assistance of counsel claim, a petitioner must demonstrate that his counsel's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 693 (1984). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* at 697. Prejudice exists only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The majority concludes that Belmontes has shown both deficiency and prejudice, but its analysis deprives the prejudice requirement of meaning. After holding the penalty-phase performance of John Schick, Belmontes's trial counsel, to be deficient, the majority concludes that the missing mitigating evidence would have had a reasonable probability of changing the jury's verdict. In recounting the aggravating evidence, Maj. Op. at 6745-47, the majority fails to mention the circumstances of the crime—although the first factor California law requires the jury to consider when setting the penalty, *see* Cal. Penal Code § 190.3, *supra* note 1. Even worse, the majority ignores the devastating aggravating evidence that would have been admitted on rebuttal.

In particular, the prosecution would have shown that Belmontes had murdered Jerry Howard in 1979. Howard's body was found in a secluded, semi-rural area. He had been executed with a bullet to the back of the head. A parole report prepared for Belmontes on May 11, 1979, remarked that "the method in which the murder was carried out indicate[d] planning, sophistication, and premeditation." Witness testimony offered strong

evidence against Belmontes. However, "because of lack of cooperation on the part of the witnesses, [Belmontes] could not be tried for murder."[3] Still, the police could prove that Belmontes possessed the gun used to kill Howard, so Belmontes agreed to plead to a charge of accessory after the fact to voluntary manslaughter. The police remained convinced of his principal role.

Once shielded from prosecution by double jeopardy, Belmontes confessed to several persons that he had shot Howard. While investigating Belmontes's criminal history in preparation for the McConnell murder trial, both Schick and the district attorney discovered that these persons, unlike the witnesses in 1979, were willing to testify. They included Belmontes's case worker at the California Youth Authority ("CYA"), Charles Sapien, who told the district attorney in 1982 that Belmontes had confessed to shooting Howard. Sapien recounted that Belmontes had denied the crime during his incarceration at CYA, but had confided to Sapien upon his release that he had "wasted that guy."[4] Another witness was Steven Cartwright, who informed the district attorney that Belmontes had confessed to him that he had killed Howard, but that in 1979, Belmontes's mother had begged him not to testify. Another witness was Detective Jake Donaldson, a longtime friend of the Belmontes family, who told Schick's investigator that the Howard killing "was definitely an execution type murder with

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3. Police records revealed that two days after the crime the police had received a call from an anonymous informant that Belmontes had stated: "I shot that guy in the head." Another anonymous call informed the police that Belmontes had been seen with Howard just before Howard was killed. Other witnesses contributed circumstantial evidence.

4. Sapien explained that Belmontes believed Sapien had aided him obtaining parole, because Sapien had written and presented to the parole board the final report before it granted Belmontes's release.

[Belmontes] being the principal involved." Belmontes does not deny the truth of this evidence.

The prosecutor at Belmontes's 1982 trial was ready to present these witnesses and other evidence of Belmontes's criminal history. However, the court granted Schick's motion to limit the extent of testimony to the crime of conviction: accessory after the fact to voluntary manslaughter.

Both parties were aware, however, that the trial court might admit the Howard evidence for other purposes, such as to rebut or to impeach testimony of character witnesses for the defense. *See* Cal. Evid. Code § 1102(b) (permitting the prosecution to use character evidence, including prior bad acts, "to rebut evidence adduced by the defendant"). The trial transcript substantiates the risk cross-examination posed to the defense. At one point, the defense attorney inadvertently elicited testimony from Belmontes's friend Robert Martinez that Belmontes was not a violent person. Outside the hearing of the jury, the prosecutor informed defense counsel and the court that he intended "to cross-examine [Martinez] fully about his knowledge of other violent actions done by Mr. Belmontes" unless the court struck the evidence from the record. He noted that "counsel was well aware of all the witnesses I have lined up to testify to [Belmontes's violent past]."[5] The court agreed: "*I'm going to have to allow him to go into the whole background if we don't do that.*" (emphasis added). Schick immediately acquiesced; the

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5. He stated that he would test the witness's knowledge of the facts that as a young man, Belmontes attempted to seize a police officer's gun during an arrest, that he carried a gun to school because he was having trouble with schoolmates, that he was a member of the Black Angels gang in Ontario, California, and that he murdered Jerry Howard. The record shows that the prosecution had extensive files to back up these allegations.

judge ordered Martinez's character testimony stricken from the record and admonished the jury to disregard it. This incident leaves little doubt that the court was ready to admit the Howard evidence for rebuttal or impeachment.

When later deposed, Schick confirmed that the Howard evidence had given him "grave concerns" and that he had structured his arguments and witnesses to avoid its admission.[6] He told habeas counsel that the prosecution had intended to call Detective Donaldson, who would have testified to the "cold-blooded fashion" in which Howard had been killed. When asked whether he believed such evidence would be "devastating," Schick said: "Certainly."

But Belmontes now argues that the trial court would not have allowed the evidence because it was not relevant to impeach expert testimony regarding Belmontes's prospects for nonviolence in an *institution*. Yet for a mental state expert to determine whether Belmontes had a lesser proclivity toward violence when supervised, she would have needed to compare his behavior in both institutional and noninstitutional settings.

Moreover, the manner in which Belmontes killed Howard would have been relevant to his institutional prospects directly, insofar as it manifested aspects of his personality. The defense supported its claim that Belmontes would be nonviolent in prison with evidence that a well-respected psychological test [7] suggested that

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6. Schick stated that he "would have expected" the prosecutor to introduce "[s]pecific facts of the case" to rebut expert testimony about Belmontes's propensity for violence.

7. Both parties' experts testified that they considered this test, the "Jesness" test, a valuable one.

he had the personality of a "conformer." To rebut an expert's interpretation of that test, the prosecutor could have asked whether the expert was aware that Belmontes had taken a leadership role in the murder of Jerry Howard or had helped establish a Chicano gang while incarcerated—acts that suggested an aggressive personality and undermined the claim that he would be a conforming and rule-abiding inmate.[8]

B

The majority bifurcates its analysis in an attempt to avoid the minefield of Belmontes's criminal history. While it concedes that Belmontes's violent acts, might be admissible if Belmontes asserted a likelihood of nonviolent prison adjustment, it declines to consider that issue on the ground that the other mitigating evidence suffices to establish prejudice. This approach simply leads the majority into a neighboring minefield: the circumstances of the Howard murder would have been admissible to rebut the other mitigating evidence as well.[9]

The majority states that "Schick should have offered the testimony of a psychologist or psychiatrist in order effectively to explain to the jury in day-to-day terms the

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8. Dr. Yates testified that if she were to diagnose Belmontes based on the evidence gathered for habeas purposes, she would deem him to have a "socialized aggressive disorder," based on "evidence of [his] social attachments and "repetitive pattern of physical violence and thefts."

9. As Belmontes argued in his amended habeas petition before the district court: "Moreover, and of paramount importance, the same mental state evidence which mitigates his role in the offense itself would have provided a compelling presentation regarding *future* conduct if given a life sentence rather than the death penalty." (emphasis in original.)

practical impact on an individual of the kind of traumas that Belmontes experienced as a child and adolescent." Maj. Op. at 6823. Had Schick done so, the prosecution could have cross-examined such expert as to the basis for her opinion. California law provides that "a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) *the matter upon which his or her opinion is based and the reasons for his or her opinion*." Cal. Evid. Code § 721(a) (emphasis added). If Schick had placed on the stand an expert to "explain[ ] the extent to which [Belmontes's childhood] problems can cause or contribute to a change in individuals that can lead to subsequent criminal conduct," Maj. Op. at 6823, the expert would have needed to know the criminal conduct in which Belmontes had engaged. The Howard murder evidence would have been admissible to
show the basis for the expert's opinion or to reveal the expert's failure to consider relevant acts in Belmontes's history. The Howard evidence would also have been relevant to question expert testimony as to Belmontes's mental state at the time of McConnell's murder. The majority asserts that "[b]y the time of McConnell's murder—indeed earlier than then—[Belmontes] was regularly using marijuana, heroin, LSD, PCP and other drugs." The Howard evidence would have been relevant to rebut any insinuation that the McConnell murder was in any way affected by Belmontes's drug use.[10/]

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10. The majority states that it is not making a factual finding, inappropriate at the appellate level, as to whether Belmontes was influenced by drug use. Maj. Op. at 6794 n.18. Additionally, it states that "the district court did not hold that humanizing evidence about Belmontes's history of substance abuse before the crime would likewise open the door to additional aggravating evidence." *Id.* However, I am at a loss as to how Belmontes's drug use would be

Dr. Yates explained that an expert could have opined whether Belmontes had "an antisocial personality disorder or simply [was] a conformist individual who was under special stress at the time." If the expert had suggested that Belmontes lost control and awareness of his impulses due to drugs or alcohol, the Howard evidence could have shown that Belmontes committed a similarly "cold-blooded" murder without such influences.

Therefore, far from leading to prejudice, the omission of expert mental-state evidence saved Belmontes from devastating cross-examination evidence. As Schick explained:

> [I]t bec[ame] apparent that the amount of evidence the prosecution was trying to introduce in this penalty trial, should we get there, was growing in leaps of bounds [*sic*]. . . . [Belmontes's prior convictions] were somewhat small in my mind next to the other factors, all of which related to this 1979 homicide of Jerry Howard. Because, as I said, it was very clear to me that what [the prosecutor] wanted to do was retry that case, put all the evidence before the jury.

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humanizing without some reference to its effect on his commission of a cruel and brutal crime or his ability to adjust to prison life without being a danger to others. Although the majority argues that the drug use evidence is humanizing because it shows that he used drugs "to help cope with the unpleasant circumstances of his life," without some sort of connection to the crime itself or a "major personality change," compare *Smith v. Stewart*, 140 F.3d 1263, 1271 (9th Cir. 1998), such mitigating evidence is of little relevance, and perhaps not mitigating at all. *See* Maj. Op. at 6770 (explaining that lack of expert testimony was significant because there was no "expert who could make *connections* between various themes in the mitigation case and explain to the jury how they could have *contributed* to Belmontes's involvement in criminal activity" (emphasis added)).

Schick noted that the prosecutor's damaging evidence was compounded

> [by] the statement [Detective Donaldson] made to [the defense investigator] that it was his . . . view that Mr. Belmontes had done that killing in 1979 in a cold-blooded fashion. And what [the prosecution] wanted to do was explain that point of view . . . and at the conclusion of it get up to the jury and say, "Here is a man who has been convicted not once but twice of murder." That's a whole different kettle of fish. . . . getting back to your question, yes, I was concerned. That was my concern.

C

Our precedent recognizes that counsel's concern for opening the door to rebuttal can defeat a claim of ineffective assistance of counsel. In *R. Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), counsel had presented no mitigating evidence, yet we defended that omission:

> The record shows that the state was prepared to present a vast array of aggravating evidence in rebuttal, including the forcible rape of Campbell's ex-wife. . . . Faced with the choice of limiting the state to a relatively tame presentation of Campbell's prior convictions, or potentially opening the door to devastating rebuttal evidence, Campbell's counsel chose the former route by electing not to present mitigating evidence. In one of the attorney's words, "[p]resentation of those [mitigating] items in my mind would bring forth a parade of horribles that in my opinion would so far bury those factors in mitigation that any chance we had of saving his life would have been lost."

Id. at 1462 (emphasis added). We noted that the defendant, like Belmontes,

> concede[d] that some of his potential mitigating evidence would have been met with strong rebuttal evidence from the state, but he speculate[d] that evidence of his "background, childhood and family relationships," and possibly evidence of his "child abuse, upbringing and drug abuse," could have been presented without opening the door to rebuttal evidence.

Id. Still, we found no prejudice: "Even if this is the case, we agree with the district court that 'given the overwhelming aggravat[ing] factors,' and 'the heinous nature of the crime,' there is no reasonable likelihood that the jury's verdict would have been different had the mitigating evidence been introduced." *Id.*

Here, as in *Kincheloe*, the state was prepared to present a vast array of aggravating evidence in rebuttal, including Belmontes's execution-style murder of Howard, his history of drug dealing, his conflicts with police, and his participation in gang activities. Even without that further aggravating evidence, the circumstances of the crime already were "simply overwhelming."

Furthermore, the majority's attempt to avoid the issue of rebuttal evidence requires it to also ignore mitigating evidence that Belmontes himself deemed crucial: evidence that Belmontes would be non-violent in prison. As Belmontes stated in his amended habeas petition in the district court:

> Common sense tells us that a rational jury will be extremely reluctant to award a life sentence if it would be exploited as a license to assault or kill

again. In contrast, a life sentence becomes far more palatable to a jury which can satisfy their primary interest in removing the defendant from open society with some certainty that he will not replicate violent offenses in prison society.

In the face of the gruesome circumstances of the crime and the already-admitted evidence of Belmontes's prior violent acts, the jury would not have had such certainty unless Schick introduced evidence of his non-violent potential. Because he was unable to do so without opening the door to devastating rebuttal evidence, the omission of such evidence was not prejudicial.

II

A

The mitigating effect of the omitted evidence would not have created a reasonable probability of altering the sentence. First, one must distinguish between evidence that was already presented, and evidence that was never admitted. The majority intermingles the two, leaving the impression that Schick omitted mitigating evidence that he in fact presented to the jury. For example, Schick presented numerous penalty phase witnesses to "humanize" Belmontes and to show that, despite a difficult background, Belmontes could relate to others.[11/] He called to the stand Belmontes's mother, grandfather,

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11. Schick explained that his four goals in the penalty phase were (1) to "humanize" Mr. Belmontes for the jury; (2) to show that he would not be a difficult prisoner and that he could form good relationships with people; (3) to show his background to the jury so that it would know what his life had been like; and (4) to raise lingering doubt whether Belmontes was really the actual killer by offering evidence of Vasquez's agreement to testify for the prosecution to obtain a lighter sentence.

his friends Darlene and Robert Martinez, Rev. Dale Barrett (chaplain at CYA Pine Grove Facility), the Haros (members of Rev. Barrett's church), and Don Miller (assistant chaplain at the CYA Preston Facility).

The majority considers the testimony of these witnesses to be of little value compared to the testimony that Schick could have presented. In particular, the majority objects that "[a]t no point did Schick mention any of the traumatic experiences that Belmontes underwent during his childhood or his youth," thereby "fail[ing] to explain to the jury how those experiences affected Belmontes; what the relationship was between the tragic events and Belmontes's subsequent criminal conduct; and why the jury should consider those circumstances in determining whether Belmontes was an individual who should be put to death or whose life should be spared." Maj. Op. at 6758-59. But the majority fails to give proper emphasis to the fact that several witnesses testified on those issues: Belmontes's mother spoke of how Belmontes's father used to beat her, once breaking her arm, and another time stabbing her and of how Belmontes suffered from the departure of her second husband and became "difficult to control." Belmontes's grandfather described how his grandson cared for his grandmother, visiting her every day in the hospital and attending her funeral. The jury did not need an expert to understand that these experiences had a negative impact on Belmontes.

B

Nor was Belmontes prejudiced by the lack of expert testimony about his rheumatic fever. Dr. Yates characterized that illness as "pretty mild," rather than "significantly debilitating," as the majority asserts. She clarified that "[a]ctually, it was the mother that expected

him to die early, but [Belmontes himself] didn't."[12] According to Dr. Yates, the illness "wasn't very severe, it was associated with [ ] arthritis, but not with anything more ominous and he probably shouldn't have had a home teacher."[13] Dr. Missett similarly stated that Belmontes "did not face an illness that was going to result in imminent death." Belmontes never was diagnosed with a depressional disorder. In fact, Dr. Yates stated that it would have been inappropriate to diagnose Belmontes with a depressional disorder, attributing his unhappiness during home-schooling to "a situational depression, which . . . just means that it's not a good situation and he doesn't like it and doesn't feel good about it." Dr. Missett opined that certain events in Belmontes's childhood corresponded with a form of "symptomatic" depression. For example, he remarked that "[i]f [Belmontes was] to be believed about his visits to [his infant sister's] grave, this would have been an indication of an early essentially childhood depression." And he stated that the "description of [Belmontes] not liking school and the feeling of not getting much out of it [to be] consistent with his having a symptomatic childhood depression." Those triggering causes for depression offered little reason to believe the depression was serious or debilitating.

On the other hand, Dr. Missett did suggest that Belmontes's sickness as a child might have led to his later use of drugs: "Belmontes's drug abuse appears to have had its onset during and immediately after the period of

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12. Dr. Missett also noted that he was not sure whether Belmontes, or his mother, believed that Belmontes would die before age 21.

13. She also noted that she "s[aw] no reason why he was so impaired that he couldn't go to school" and speculated that "it may have been coming more from the mother than any [medical necessity]."

time that he was so repeatedly physically ill." He opined that Belmontes might have used drugs as a form of "self-medication." Although this evidence might have led the jury to pity Belmontes, the prosecutor could have brought in damaging evidence on crossexamination. For example, the prosecutor could have queried of such expert whether depression also induced Belmontes to *deal and to distribute* drugs. That rebuttal evidence would have undercut Schick's efforts to transform Belmontes's drug-related conduct into a cause for sympathy.[14]

C

Belmontes's drug use would not have carried much weight to humanize him as the majority would suggest. When deposed for habeas purposes, Schick's trial mental-state expert, Dr. Cavanaugh, opined that Belmontes had a "clear mental status at the time of the incident [murder of McConnell]." He stated that Belmontes claimed to have been high on drugs shortly before the crime, and yet his "recounting of the events leading up to this murder was very, very detailed"—a detailed description inconsistent with a person whose actions were influenced by drugs.[15] Moreover, the way in which the crime was planned and committed indicates forethought and control: Belmontes armed himself with a metal bar and

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14. A police report dated March 1, 1979, described how surveillance officers witnessed Belmontes give two balloons of heroin to the confidential informant. After Belmontes parted company with the confidential informant, the informant gave the officers the heroin. He told them that he had promised to try to find an "outfit" (heroin injection paraphernalia) for Belmontes and that Belmontes had warned him that he was armed, had committed at least one murder, and had shot people on two different occasions.

15. Other witnesses corroborated the accuracy of Belmontes's detailed description. Other witnesses corroborated the accuracy of Belmontes's detailed description.

put on gloves[16]; after the crime, Belmontes had the lucidity to discard the bloody weapon in a river. Dr. Yates thought that the evidence of Belmontes's mental state at the time of the crime could cut either way. On the one hand, his careful preparation and execution of the crime suggested that he retained self control and that his brutal act was
representative of his general personality. On the other hand, Belmontes "could have been very impulsive at times." If he were "under the influence of substances," Dr. Yates remarked, "[h]is anger could have broken through, even though it wasn't his ordinary way of acting and feeling and thinking, he could have done something that was horrible." (emphasis added). The prosecution could have impeached such testimony regarding Belmontes's "*ordinary way of acting and feeling and thinking*," and asked whether that opinion took into account the fact that Belmontes had killed Howard without any evidence of drug or alcohol intoxication. Again, any effort to lessen Belmontes's culpability for the crime would have either been weak or counterproductive.

D

If Schick had offered expert testimony to show that Belmontes's childhood experiences harmed his ability to interact with others, such testimony would have led to similar rebuttal evidence. For example, Dr. Missett stated Belmontes's grandfather expressed anti-Latino sentiments toward Belmontes's father, causing Belmontes a sense of "inferiority and lower self-esteem." He opined that it became "difficult [for Belmontes] to mainstream himself socially or racially into a mixed situation or a largely Anglo situation at school." Such testimony might

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16. Belmontes himself told Dr. Yates about the gloves, which he stated he always wore to "do a job."

have explained why Belmontes decided to join gangs. But Belmontes was not prejudiced by the lack of such explanation, since Schick succeeded in keeping out evidence of gang relations altogether.

The majority also contends that Schick should have introduced mitigating evidence to show Belmontes's difficult childhood and to emphasize the abuse in the family. However, Belmontes's mother had already testified to being beaten by Belmontes's father. And as a psychological expert, Dr. Missett found it significant that Belmontes never asserted that he had witnessed his father hit his mother. Even now, Belmontes offers no evidence as to how the abuse impacted him and never states that he was abused himself.

Furthermore, several witnesses noted positive aspects of Belmontes's family relationships. Belmontes's sister recounted how she and Belmontes went to their father's on Sundays and "spent the whole day together." She remembered the days positively, but noted that they "never did much because he never had any money." When asked whether the financial problems of the family caused Belmontes psychological harm, Dr. Missett opined that the "father's inability to hold a job even in the face of [ ] poverty," caused Belmontes a "level of shame." It is not clear, however, how much that "shame" affected Belmontes or his relationships, for his sister noted that he "had lots of friends."

Having painted Belmontes's childhood in the darkest possible light, the majority attempts to cite sickness and poverty and family troubles as the reason why he became a violent murderer. The majority notes that witnesses who knew Belmontes as a child described him as a "sweet" boy who was polite and pleasing. And as a psychological expert, Dr. Missett noted that Belmontes

was "extremely well socialized" and had "a very well-developed capacity to function in a socially attractive way by the time the he [wa]s entering adolescence." The majority cites these positive features of Belmontes as a child to support its assumption that external factors, and not volition, can be blamed for Belmontes's criminal transformation.

The majority's suggestion that Belmontes's rheumatic fever
caused so dramatic a change in his personality is undermined by the "pretty mild" characterization of that illness by Dr. Yates. And Belmontes's own sister stated that she "did not notice or understand emotional changes in him" due to his illness—"He was the same easygoing person in the way he related to [her]." And while the majority contends that Belmontes suffered from having to move into a single motel room, his sister recounted that Belmontes "did not stay at the [ ] motel very much." The majority's suggestion that the jury would have considered Belmontes less culpable for McConnell's murder, had they known further details about his childhood, is simply implausible.

E

The cumulative effect of Belmontes's childhood experiences
would have offered little antidote to the "overwhelming" evidence of Belmontes's later drug trafficking, involvement in gangs, assault on his girlfriend while she was pregnant, and multiple murders. Schick's failure to offer further testimony about Belmontes's childhood experiences was not prejudicial. Even if the jury remained ignorant of the chilling Howard murder, the aggravating evidence presented overwhelmed any benefit of the omitted mitigating evidence. The jury would not have

forgotten Belmontes's brutality, evidenced by the autopsy photos of McConnell's mangled head. The jury would have recalled Belmontes's testimony that he and his friends left McConnell's bloody body and drove to a place where they could sell her belongings and buy beer. The jury still would have had no explanation for why, even in his closing address, Belmontes expressed no remorse.

III

A

Contrary to the majority's claim, neither *Mayfield v. Woodford*, 270 F.3d 915 (9th Cir. 2001) (en banc), nor *Douglas v. Woodford*, 316 F.3d 1079 (9th Cir. 2003), supports its conclusion.

Mayfield involved a claim of ineffective assistance in a capital sentencing. The majority deems the facts in *Mayfield* nearly identical to those at bar, with only two significant differences: In *Mayfield*, the aggravating evidence was "strong" and the mitigating evidence introduced was "substantial"; here the state conceded that the aggravating evidence was "scant" and the mitigating evidence introduced was "insubstantial." Maj. Op. at 6805-06. The majority's statement with respect to the strength of the aggravating evidence distorts the state's reference, which characterized the aggravating evidence *other than the circumstances of the crime*.[17] When the circumstances of the crime were considered in context, the prosecutor made clear that the death penalty was appropriate.

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17. The majority argues that I have incorrectly interpreted statements made by the State at oral argument, however, on this point my colleagues and I will simply have to disagree. Maj. Op. at 6802 n.21.

Moreover, the deficiency of Mayfield's counsel was marked and clearly consequential. Mayfield's counsel spent only 40 hours on the entire trial and waived opening argument in the penalty phase. Mayfield alleged that he had been influenced by drugs at the time of the offense, but his counsel "mistakenly stipulated that [his] urine tested negative for PCP the day after the crime, indicating to the jury both that Mayfield did not have a substance abuse problem and that Mayfield had lied about it." *Id.* The lawyer called only one witness at the penalty phase. *Mayfield*, 270 F.3d at 928. Although important,[18] this witness's testimony revealed only a fraction of the mitigating evidence available to Mayfield. At a later state evidentiary hearing on habeas, Mayfield's family members, none of whom testified at trial, described how Mayfield was born to a 15-year-old mother and grew up in the projects. They recounted his growing emotional disturbance as he "began drinking and smoking marijuana to fit in with the tough kids of the San Bernardino projects" and started using PCP. *Id.* at 931. Friends and siblings explained that his "personality changed as a result of his drug and alcohol abuse and his poorly controlled diabetes," *id.* at 931, and that he became "incorrigible and occasionally had physical altercations with [his mother]."

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18. The witness, a doctor, testified that Mayfield had been diagnosed with diabetes at age nine, suffered from a childhood behavioral disorder caused by depression, and began using PCP in his late teens and that his "mental state deteriorated because of drug usage." *Id.* at 929. The doctor also revealed that Mayfield repeatedly had expressed remorse and he recounted that others described Mayfield as a gentle person and the crimes to be out of character. Unfortunately, the mitigating effect of the doctor's testimony was undermined by his erroneous statement that Mayfield "was not under the influence of drugs or alcohol the night of the crimes." *Id.* at 930.

Experts at the later proceeding verified that Mayfield had been "diagnosed with childhood behavioral disorder and depression" and described how "[a] psychological evaluation indicated that, although he had low-normal IQ, 'he actually performed as though he were *mildly retarded*.' " *Id.* (emphasis added). A psychiatrist explained that " 'a growing onslaught of catastrophes, losses, and increased emotional turmoil . . . ma[de] it more difficult for him to figure out what is the best thing to do and how to control his emotions.' " *Id.* An endocrinologist detailed the impact of Mayfield's longterm fight with diabetes, including comas and hospitalizations as frequent as five times a month. This evidence might well have engendered the sympathy of Mayfield's jury, had it been presented.

Mayfield also had significant positive character evidence—evident in his case—that would not have opened the door to devastating rebuttal evidence. Witnesses described Mayfield as "helpful and generous" and recounted that he had looked after his younger brother and sister and had routinely assisted his wheelchair bound uncle. *Id.* at 932. Other witnesses told how Mayfield had aided them to overcome personal struggles, how he loved his son, how he interacted well with children, and how he was not a violent person. *Id.* Finally, they stated that they loved Mayfield and wished that his life would be spared. *Id.*

Belmontes had nothing close to this mitigating evidence. Unlike Mayfield's documented brain damage from physical and mental disorders, Belmontes had "pretty mild" rheumatic fever and "situational" or "symptomatic" childhood depression. In contrast with the evidence suggesting that Mayfield devoted enormous amounts of time to actively assist others, Belmontes's mother stated that he used his illness as an excuse to be

lazy.[19] Mayfield and Belmontes both abused drugs, but Belmontes also dealt them.[20] And while no family or friends were presented to testify to the positive aspects of Mayfield's character, Belmontes had several witnesses who testified on his behalf and still the jury found their words insufficient to justify mercy.[21]

The majority complains that the witnesses did not show "Belmontes's positive attributes": that "he was a kind, responsible, and likeable child who got along well with his siblings, was respectful towards his grandparents despite their disapproval of his mixed racial background, participated in community activities, kept up in school and got along with his teachers before his illness, and made friends easily." Maj. Op. at 6792. But several aspects of Belmontes's positive childhood characteristics *were* presented: Belmontes's mother told the jury of his "close" relationship with his sister, his grandfather spoke of Belmontes's devotion to his grandmother, the jury had

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19. Belmontes's parole agent at CYA recorded this statement in a report on June 13, 1979.

20. Belmontes's girlfriend and the mother of his child, Barbara Murillo, stated that Belmontes did not use drugs, because they were bad for his illness. Police reports included witness statements and documentation that Belmontes engaged in drug dealing.

21. As the defense investigator discovered, several persons who knew Belmontes as a youth had only negative things to say. Members of the Detective Staff at the Ontario Police Department (who investigated the Howard murder) "felt that [Belmontes's] mother was very over-protective of her son and other siblings." They noted his reputation as a "heavily involved" member of the Black Angels gang, and stated that he had "a long history of anti-social behavior" and was "very fortunate that he ha[d] not been caught" for the crimes he had committed. Belmontes's probation officers indicated similar sentiments and noted that he was "very manipulative," a characterization corroborated by several psychiatric experts.

learned that Belmontes had assumed a leadership position on his CYA fire crew and had joined the "M2" religious program while in CYA custody. The remaining evidence that could have been presented would have added little: Belmontes was involved in Sea Cadets and little league and many adults found him to be a polite child with a pleasant demeanor.[22] Third, evidence that Belmontes "kept up in school" could have been impeached by noting that he was a highschool drop-out.[23]

Even more importantly, we distinguished the facts in *Mayfield* from the situation where new mitigating evidence would open the door to additional aggravating evidence. Specifically, we cited the Fifth Circuit's holding in *Williams v. Cain*, 125 F.3d 269, 278-280 (5th Cir. 1997), in which the court rejected an ineffective assistance of counsel claim because "[the omitted] testimony *could have opened the door* to testimony regarding [the defendant's] drug use, expulsion from school, and discharge from [a] job [and] such testimony 'would have had little mitigating effect against the aggravating evidence.' " *Mayfield*, 270 F.3d at 938 (emphasis added). The only such rebuttal evidence in *Mayfield* related to Mayfield's mother's awareness of "an incident in which Mayfield may have engaged in inappropriate sexual conduct with his infant sister when

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22. At the same time, the fact that he brought a gun to school because he was having trouble with classmates suggested that his relationships with his childhood peers were not as favorable as the majority would suggest. There is little doubt the prosecution could have brought that incident in as rebuttal to evidence of Belmontes's positive character as a child.

23. An attempt by the majority to attribute this decision to leave school to Belmontes's rheumatic fever would be contradicted by Dr. Yates's
statement that she saw no reason why Belmontes had to leave school even in the worst period of his illness.

he was twelve." *Id.* at 928. Had her testimony been the only available testimony, we agreed that this risk "argue[d] against a determination of prejudice." *Id.* However, counsel had failed to present *any* testimony by family or friends, although "family members, except for Mayfield's mother, *did not have damaging testimony.*" *Id.* (emphasis added).

Belmontes's case differs from *Mayfield* because the mitigating evidence Schick could have presented would have elicited a plethora of aggravating rebuttal evidence—evidence that leaves little doubt that the net effect of the additional testimony would have been negative.

Belmontes has not made the required showing of prejudice. There was no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The majority's discordant conclusion conflicts with *Strickland* and manifests disagreement with governing precedent. "Unless a defendant makes both showings [of deficiency and prejudice], it cannot be said that the . . . death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687. The majority's view appears to adopt a "*per se* rule that we must reverse a death sentence if we find that counsel's performance at the penalty phase was deficient"—a rule we have expressly rejected. *Mayfield*, 270 F.3d at 928 (citations omitted).

B

Nor can I accept the majority's facile analogy of this case to *Douglas*, 316 F.3d at 1079. Contrary to its assertion that "[t]he facts of the case at hand and those in

Douglas are quite similar," Maj. Op. at 6781, the two cases differed in crucial respects.

The aggravating evidence in *Douglas* was powerful: Douglas killed two teenage girls after torturing them and forcing them to commit sex acts. *Douglas v. Woodford*, 316 F.3d at 1079, 1083 (9th Cir. 2003). The omitted mitigating evidence, however, was also powerful: Douglas had been orphaned and placed in foster care; his alcoholic foster father locked him in a closet for long periods of time, causing him permanent claustrophobia. After running away at 15 to join the Marines, "Douglas was arrested and put in a Florida jail where he was beaten and gang-raped by other inmates." *Id.* at 1088. Later, Douglas got in a car accident that left him with permanent brain damage. Despite these traumatic experiences and their documented harm to his mental capacity, Douglas had acted heroically even in his older years: he had medals and commendations from the Marines, and witnesses testified that he had saved the lives of two drowning sailors. *Id.* Our conclusion in *Douglas* was based on a reasonable probability that the jury would have spared Douglas his life, had it known these sympathetic facts.

In *Douglas*, as in *Mayfield*, we confronted no risk that devastating aggravating evidence would enter on crossexamination. The available aggravating evidence against
Douglas *had already been presented*. The case does not compare to *Belmontes*, where the prosecution had found a skeleton in the closet, and was waiting for Belmontes to open the door.

IV

Equally troubling is the majority's conclusion that Schick's preparation of the penalty phase witnesses was

inadequate and prejudicial. The majority states that:

> In addition to failing to investigate adequately, Schick did little to prepare the lay witnesses he called to testify. . . . *It is evident* from the testimony given at the penalty phase that Schick did not . . . [prepare the witnesses]. . . . Several of the witnesses who knew Belmontes best . . . *did not testify to a single positive quality he possessed.*

Maj. Op. at 6785 (emphasis added). Without any meaningful discussion of Schick's actual preparation of the witnesses,[24] the majority assumes that the limited appeal of the witnesses's testimony reflects a lack of coaching.

The majority does not explain what positive qualities were not mentioned, but could have been illuminated. Belmontes's mother already had told the jury that Belmontes had a close relationship with his sister.[25] His

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24. This same failing is reflected in Belmontes's argument. He focuses on the resulting testimony, without describing what Schick did or did not do to prepare the witnesses. He states that Belmontes received "virtually no support from his obviously nervous and tongue-tied mother" and concludes that the "presentation [of the mother] fell in the same range between 'woefully inadequate' and 'deleterious.' " But we have no reason to believe that the mother's nervousness on the stand was the result of inadequate preparation.

25. Belmontes argues that the mother should have been shown "photographs of [Belmontes] actually involved in positive activities as a youth, and [been asked] to identify and describe the contents for the jury." But counsel enjoys "wide latitude . . . in making tactical decisions," such as selecting which evidence to present to make the most compelling argument. *Strickland*, 466 U.S. at 689-90. In any case, Dr. Yates aptly noted that the photographs might not have represented such positive moments: "The pictures are a very small slice of what happened and usually it's a family affair when people are saying, well, smile now and that's not necessarily characteristic

grandfather had described Belmontes's faithfulness to his grandmother. His friends Robert and Darlene Martinez had described their close relationship. Rev. Barrett and the Haros had described the sincere religious commitment Belmontes made during his CYA incarceration. Finally, Miller had testified to Belmontes's ability to make a positive contribution while in prison.[26/]

The majority faults Schick for allowing the witnesses to state that they believed Belmontes was innocent. Although such view contradicted the jury's guilty verdict, Schick's failure to stop the witnesses from so testifying was not objectionable. In fact, this testimony may have had a mitigating effect, because it allowed Schick to present positive character evidence indirectly, without opening the door to a damaging rebuttal. It is hard to imagine that the witnesses's implication that Belmontes was normally not a violent person prejudiced Belmontes's hope for leniency.

V

For the third time, the majority has granted Belmontes habeas relief without the requisite legal or factual

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of anything that goes on in the family."

26. The majority's analysis erroneously assumes that the witnesses' testimony required explanation: "Although Schick stated in his deposition that one of his four themes at the penalty phase was Belmontes's capacity to adjust well to prison, he failed to argue that such was the import of the testimony of any of the witnesses he had called to testify." Maj. Op. at 6787. But much of what the witnesses said conveyed a clear mitigating message on its own. For example, Miller said that Belmontes had returned on several occasions to speak to later CYA wards and to offer them motivating advice. Miller explained that he believed Belmontes could offer similar encouragement and inspiration to fellow prison inmates. The jury did not need Schick to explain "the import of th[at] testimony." *Id.*

support. The mere desire for mercy toward a man found guilty of capital murder, however admirable, provides no legal ground to disturb the jury's sentence of death. Again, I must dissent.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, *Petitioner-Appellant,* v. ROBERT L. AYERS, JR., Warden for the California State Prison at San Quentin, *Respondent-Appellee.*	No. 01-99018 D.C. No. CV-89-00736-DFL Eastern District of California, Sacramento En Banc Order

Filed December 30, 2008

Before: Stephen Reinhardt, Diarmuid F. O' Scannlain and
Richard A. Paez, Circuit Judges.

Order;
Concurrence by Judge Reinhardt;
Dissent by Judge Callahan

ORDER

Judges Reinhardt and Paez voted to deny the Respondent-Appellee's petition for rehearing and rehearing en banc. Judge O'Scannlain voted to grant the petition for rehearing and rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. FED. R. APP. P. 35.

The petition for rehearing en banc is denied.

REINHARDT, Circuit Judge, concurring in the denial of the petition for rehearing en banc, joined by Judge PAEZ:

There is no greater burden that falls on a member of the judiciary than to sit in judgment on whether an individual shall live or die, and no greater responsibility than to make certain that every capital defendant receives the full protection to which he is entitled under our Constitution and our laws. When judges consider a case such as this, that not only presents serious questions of constitutional law but that may result in the most serious of human consequences, it is their duty to consider and weigh each constitutional claim made by the defendant with the utmost care. The failure to do so would be a failure to fulfill an obligation not only to the defendant, but to the public and to our legal system itself. Equally, it is the responsibility of a judge who disagrees with the court's decision to explain her disagreement fairly and objectively and to refrain from seeking to bias or mislead the reader with respect to the serious constitutional questions involved.

We write this brief concurring opinion to make one point clear.[1] Judge Callahan opens her dissent from the denial of the petition for rehearing en banc with the statement that "[t]his is the third time that a panel of this court has set aside Belmontes's death sentence." Dissent at 16811-12. Read in context, the implication, carefully phrased though it may be in its final iteration, is that we

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1. Although we do not agree with the legal arguments advanced in Judge Callahan's dissent from the denial of the petition for rehearing en banc, they are proper subjects for fair debate among jurists. Our position, and the position of this court, as to those issues is set forth in the court's opinion, *Belmontes v. Ayers*, 529 F.3d 834 (9th Cir. 2008), and requires no further discussion here.

have flouted the will of the Supreme Court, and attempted to set aside Belmontes's death sentence on three separate occasions, or for three separate reasons. The sentence can serve only to bias the reader who reaches the merits of the constitutional question later in the dissent. Moreover, the sentence is accompanied by a footnote that makes it appear that the Supreme Court has twice reversed our prior decisions.

As Judge Callahan well knows, the panel which has considered Belmontes's death sentence for well over six years has at all times diligently sought to implement the Constitution and to fulfill its function of ensuring that individuals are not executed without due process of law. In that time, the majority of the panel that issued what is now the opinion of the court has found *two* serious and prejudicial violations of Belmontes's constitutional rights. A closely divided Supreme Court disagreed with *one* of those conclusions by a vote of 5-4. It has expressed no view on the second one — the violation that we consider here.

The single constitutional issue we resolved in Belmontes's favor prior to the current decision was the validity of a highly questionable jury instruction, which California had already changed because of its ambiguity

if not its unfairness.[2] Unfortunately for Belmontes, the change came too late to help him. In the meantime, while our initial decision reversing the capital sentence based on the original instruction was pending, the Supreme Court upheld the instruction in a case governed by AEDPA, *Brown v. Payton*, 544 U.S. 133 (2005). It did so, however, not on the merits, but on the ground that any error did not meet the AEDPA requirements — requirements that were not applicable to Belmontes's case.[3] Instead of reviewing our opinion invalidating the instruction in a pre-AEDPA case, the Court issued its customary GVR[4] so that we could determine whether its decision affected our ruling. *Brown v. Belmontes*, 544 U.S. 945 (2005). When we concluded that it did not, and that our pre-AEDPA ruling on the merits was not affected by the Court's post-AEDPA ruling, the Court for the first time agreed to consider on the merits the question of the constitutionality of the jury instruction. As noted, it ultimately upheld the instruction by a 5-4 vote. *Ayers v.*

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2. In 1983, "[j]ust a year after respondent's sentencing[,] the California Supreme Court evinced considerable discomfort with factor (k)," the instruction in question, and "inserted a critical footnote effectively amending factor (k) and expanding the evidence that a California jury could properly consider in deciding whether to impose a death sentence." *Ayers v. Belmontes*, 127 S. Ct. 469, 482 (2006) (Stevens, J., dissenting). Subsequently, the California legislature also amended the jury instruction in question in such a way as to confirm that "the category of evidence that may provide the basis for a sentence other than death is much broader that the category described in factor (k)." *Id.* at 482 n.2.

3. Justice Breyer, who gave the majority its fifth vote in *Payton*, explicitly stated in his concurrence that "this is a case in which Congress'instruction to defer to the reasonable conclusions of state-court judges makes a critical difference. *See* 28 U.S.C. § 2254(d)(1). Were I a California state judge, I would likely hold that Payton's penalty-phase proceedings violated the Eighth Amendment." *Payton*, 544 U.S. at 148 (Breyer, J., concurring).

4. Order granting, vacating, and remanding.

Belmontes, 127 S.Ct. 469 (2006). As is apparent from a comparison of the majority opinion and the dissent, as well as from the nature of the division in the Court, it was an extremely close question.

At the time we decided the jury instruction issue, we were aware that a second, equally serious, constitutional question had been raised regarding ineffective assistance of counsel. We decided, without objection, to resolve only the former issue in our first decision, for what appeared to us to be compelling reasons. Where the resolution of one constitutional issue will dispose of a case, thus obviating the need to reach a second, it is the general jurisprudential practice not to decide both questions simply in order to provide an alternative basis for the court's decision. Although it may be within our discretion to resolve more than one constitutional issue when it is unnecessary to do so, courts do not ordinarily act contrary to the well-established rule that we avoid deciding constitutional questions if we can arrive at the same result without reaching them.

In our present opinion, then, we are simply doing what the law requires of us — confronting an extremely serious, unquestionably legitimate constitutional issue that we found no reason to reach the first time the case was before us. That issue is whether defendant's counsel provided ineffective assistance at the penalty phase. Upon exhaustive review of the law and the facts before us, we agreed with Belmontes and concluded that he had received and been prejudiced by constitutionally deficient representation.

Judge Callahan's introduction subtly distorts what has transpired in the pertinent judicial proceedings and leaves the reader with a false impression of what this court has done in the past and what it is doing now. More

important, it frames the ensuing discussion so as to prejudice the uninformed reader's view of the merits of the constitutional case. Putting our fellow human beings to death is far too serious a business for a resort to such tactics — or for judges to allow themselves to be swayed by them. Here, our colleagues have rightly denied the petition to rehear the case en banc, and the vast majority of this court's active judges have declined to sign their names to Judge Callahan's dissent. With the assurance that we have faithfully upheld the Constitution, and that we have done nothing less than give the most deliberate consideration to each claim presented to us, we regretfully find it necessary to file this concurrence in the denial of the petition for rehearing en banc.

CALLAHAN, Circuit Judge, with whom O'SCANNLAIN, KLEINFELD, GOULD, TALLMAN, BYBEE, BEA, and N.R. SMITH, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I again must respectfully dissent from denial of rehearing en banc. This is the third time that a panel of this court has set aside Belmontes's death sentence.[1] However, even if this were our first exposure to the case, the panel's majority opinion has created a standard for effective assistance of counsel in a death penalty case that, in effect, guarantees a defendant a second penalty stage trial. The majority's interpretation of the facts in this case eviscerates the prejudice prong of the test for ineffective assistance of counsel set forth in *Strickland v.*

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1. *See Belmontes v. Woodford*, 335 F.3d 1024 (9th Cir. 2003), *amended* 350 F.3d 861, *rev'd sub nom. Brown v. Belmontes*, 544 U.S. 945 (2005); *Belmontes v. Brown*, 414 F.3d 1094 (9th Cir. 2005), *rev'd* in *Ayers v. Belmontes*, 549 U.S. 7 (2006).

Washington, 466 U.S. 668, 687 (1984).[2] In doing so, the majority ignores both the achievements of Belmontes's counsel as well as Belmontes's own approach to his case.

I

The majority asserts that counsel should have presented mitigating evidence that Belmontes as a child functioned well in a deplorable environment until the onset of rheumatic fever when he was 14 years old "left him isolated from his peers and depressed," and "led him to engage in regular drug use beginning when he was in his early teens." *Belmontes v. Ayers*, 529 F.3d 834, 865 (9th Cir. 2008). It notes that the jury "never heard testimony about the traumas that Belmontes faced as a youth; it never heard that he possessed many positive attributes, and it never heard that he had struggled with substance abuse since his early teens."[3] *Id.* at 866. The majority asserts that if this evidence had been presented "there is a reasonable probability that the jury would have come to a different conclusion about Belmontes's sentence." *Id.*

This is a myopic reading of the record and ignores what would have been the devastating consequences of any attempt to relate Belmontes's childhood experiences to his murder of Steacy McConnell. The majority is able to develop its analysis only by ignoring or minimizing the

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2. A panel took a similar approach to the prejudice prong in *Correll v. Ryan*, 539 F.3d. 938, 970-82 (9th Cir. 2008) (Judge Callahan's opinion dissenting from the denial of rehearing en banc, joined by Chief Judge Kozinski and Judges O'Scannlain, Kleinfeld, Tallman, and Bea).

3. The majority admits that it does "not suggest that Belmontes was under the influence of drugs during the commission of the murder." *Belmontes*, 529 F.3d at 865 n.18.

fact that Belmontes's attorney, John Schick, had managed to exclude from the jury's consideration all evidence that Belmontes had not only previously committed a cold-blooded, execution-style murder, but had also told several people that he had done so. Any further effort to promote Belmontes's childhood experiences as a mitigating factor would have resulted in the jury learning that Belmontes had committed a prior murder and had basically gotten away with it. Because the available evidence of Belmontes's prior murder is damning, counsel's failure to explore the mitigating evidence was not prejudicial.

What sets this case apart from other cases — what distinguishes it from *Mayfield v. Woodford*, 270 F.3d 915 (9th Cir. 2001) (en banc), and *Douglas v. Woodford*, 316 F.3d 1079 (9th Cir. 2003), on which the majority relies — is the extraordinary evidence that Belmontes had previously committed a cold-blooded, execution-style murder. This was the elephant in the courtroom. Belmontes knew of the evidence, the prosecutor knew of the evidence, and the judge knew of the evidence, but Belmontes's counsel managed to keep the jury from hearing the evidence.

The evidence was overwhelming. In the spring of 1979, two years before Belmontes murdered Steacy, Jerry Howard's body was found in a secluded, semi-rural area. "He had been executed with a bullet to the back of the head." *Belmontes*, 529 F.3d at 880 (O'Scannlain, J., dissenting). In his dissent from the majority's opinion, Judge O'Scannlain recounts the evidence connecting Belmontes to this execution as follows:

> A parole report prepared for Belmontes on May 11, 1979, remarked that "the method in which the murder was carried out indicate[d] planning, sophistication, and premeditation." Witness

testimony offered strong evidence against Belmontes. However, "because of lack of cooperation on the part of the witnesses, [Belmontes] could not be tried for murder." **FN3** Still, the police could prove that Belmontes possessed the gun used to kill Howard, so Belmontes agreed to plead to a charge of accessory after the fact to voluntary manslaughter. The police remained convinced of his principal role.

> FN3. Police records revealed that two days after the crime the police had received a call from an anonymous informant that Belmontes had stated: "I shot that guy in the head." Another anonymous call informed the police that Belmontes had been seen with Howard just before Howard was killed. Other witnesses contributed circumstantial evidence.

Once shielded from prosecution by double jeopardy, Belmontes confessed to several persons that he had shot Howard. While investigating Belmontes's criminal history in preparation for the McConnell murder trial, both Schick and the district attorney discovered that these persons, unlike the witnesses in 1979, were willing to testify. They included Belmontes's case worker at the California Youth Authority ("CYA"), Charles Sapien, who told the district attorney in 1982 that Belmontes had confessed to shooting Howard. Sapien recounted that Belmontes had denied the crime during his incarceration at CYA, but had confided to Sapien upon his release that he had "wasted that guy." Another witness was Steven Cartwright, who informed the district attorney that Belmontes had confessed to him that he had killed Howard, but that in 1979, Belmontes's mother had begged him not to testify. Another witness was Detective Jake Donaldson, a longtime friend of the Belmontes family, who told Schick's investigator that the Howard

killing "was definitely an execution type murder with [Belmontes] being the principal involved." Belmontes does not deny the truth of this evidence.

529 F.3d at 880-81 (footnote 4 omitted).

The prosecutor was ready to present these witnesses and other evidence of Belmontes's criminal history, but Belmontes's attorney prevailed upon the court "to limit the extent of testimony to the crime of conviction: accessory after the fact to voluntary manslaughter." *Id.* at 881. In its petition for rehearing, the state offered the following perspective on this ruling:

> Prior to the penalty-phase trial, Schick accomplished what can be fairly described as a minor legal miracle. The prosecution had moved to introduce additional evidence about Belmontes' 1979 conviction of being an accessory after the fact to voluntary manslaughter. Specifically, the prosecution proffered evidence that Belmontes had in fact murdered the victim in the case, Jerry Howard, and had confessed to the killing after being committed to CYA for the offense. (RT 2237-2240, 2261).
>
> Schick persuaded the court to disallow this evidence on the ground that the accessory conviction was res judicata. (RT 2245-46, 2254, 2263.) The court's limitation on the State's ability to present this additional aggravating evidence was a clear violation of California law. See *People v. Koontz*, 27 Cal.4th 1041, 1087 (2002); *People v. Bradford*, 15 Cal.4th 1229, 1375 (1997).

Even though the trial court had excluded evidence of Belmontes's role in Howard's murder, counsel had to

remain vigilant to keep the devastating evidence out.[4] In his dissent, Judge O'Scannlain writes:

> Both parties were aware, however, that the trial court might admit the Howard evidence for other purposes, such as to rebut or to impeach testimony of character witnesses for the defense. *See* Cal. Evid. Code § 1102(b) (permitting the prosecution to use character evidence, including prior bad acts, "to rebut evidence adduced by the defendant"). The trial transcript substantiates the risk cross-examination posed to the defense. At one point, the defense attorney inadvertently elicited testimony from Belmontes's friend Robert Martinez that Belmontes was not a violent person. Outside the hearing of the jury, the prosecutor informed defense counsel and the court that he intended "to cross-examine [Martinez] fully about his knowledge of other violent actions done by Mr. Belmontes" unless the court struck the evidence from the record. He noted that "counsel was well aware of all the witnesses I have lined up to testify to [Belmontes's violent past]." **FN5** The court agreed: "*I'm going to have to allow him to go into the whole background if we don't do that.*" (emphasis added). Schick immediately acquiesced; the judge ordered Martinez's character testimony stricken from the record and admonished the jury to disregard it. This incident leaves little doubt that the court was ready to admit the Howard

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4. In his dissent, Judge O'Scannlain notes that at his deposition, Schick indicated that the Howard evidence had given him "'grave concern' and that he had structured his arguments and witnesses to avoid its admission." *Belmontes*, 529 F.3d at 881. Schick "told habeas counsel that the prosecution had intended to call Detective Donaldson, who would have testified to the 'cold-blooded fashion' in which Howard had been killed. When asked whether he believed such evidence would be 'devastating,' Schick said: 'Certainly.' " *Id.*

evidence for rebuttal or impeachment.

> FN5. He stated that he would test the witness's knowledge of the facts that as a young man, Belmontes attempted to seize a police officer's gun during an arrest, that he carried a gun to school because he was having trouble with schoolmates, that he was a member of the Black Angels gang in Ontario, California, and that he murdered Jerry Howard. The record shows that the prosecution had extensive files to back up these allegations.

Belmontes, 529 F.3d at 881.

In light of the available evidence and the trial court's willingness to admit it on cross-examination, any effort to develop the majority's mitigating evidence would have resulted in the admission of the aggravating evidence and the jury imposing the death penalty. The approach proposed by the majority could only be suggested after all other tactics to avoid the death penalty have failed. Indeed, there can be no doubt that had counsel followed the majority's advice and sought to develop the mitigating evidence with the result that Belmontes's confessions to murdering Howard were admitted, Belmontes would have had a compelling claim of ineffective assistance of counsel.

II

The majority attempts to circumvent this barrier to prejudice by focusing on all the ways that counsel, in the majority's opinion, failed to provide effective assistance. However, even accepting the majority's characterization of counsel's efforts, it is clear that the excluded aggravating evidence far outweighed any benefit that might have arisen from the admission of further

mitigating evidence.

The majority asserts that counsel failed:

> - to conduct an adequate investigation of possible mitigating evidence and to properly prepare Belmontes for the penalty phase of the trial, *Belmontes*, 529 F.3d at 849-51;
>
> - to present additional mitigating evidence to the jury, *id.* at 851-853;
>
> - to present to the jury "substantial evidence in mitigation that might have humanized Belmontes," *id.* at 863;
>
> - "to adequately prepare his witnesses to testify with the result that their testimony was unhelpful and possibly even damaging," *id.*;
>
> - "to present an expert to explain the relevance of the available mitigating evidence to the jury," *id.*; and,
>
> - "to explain to the jury in his closing argument the relevance of the small quantum of mitigating evidence he did introduce, and failed to make any of the critical humanizing arguments that might influence a jury," *id.*

Judge O'Scannlain's dissent notes a number of the factual problems with these assertions.[5/] However, the

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5. For example, the majority asserts that Schick "did not effectively prepare the lay witnesses he called to testify." *Belmontes*, 529 F.3d at 861.

In particular, the majority contends:

key flaw in the

> Several of the witnesses who knew Belmontes best and clearly could have provided compelling mitigating evidence did not tes-tify to a single positive quality he possessed. Instead, witness after witness told the same jury that had just found Belmontes guilty of first degree murder beyond a reasonable doubt, that Belmontes should not receive the death penalty because he was innocent. Most glaringly, Belmontes's own mother did not offer a single reason not to execute her son, although she obviously could have done so had she been properly advised regarding the purpose and nature of the inquiry.

Id. (footnotes omitted).

Judge O'Scannlain questions whether the limited appeal of the witnesses' testimony fairly reflects a lack of coaching. *Id.* at 891. He further notes:

> The majority does not explain what positive qualities were not mentioned, but could have been illuminated. Belmontes's mother already had told the jury that Belmontes had a close relationship with his sister. His grandfather had described Belmontes's faithfulness to his grandmother. His friends Robert and Darlene Martinez had described their close relationship. Rev. Barrett and the Haros had described the sincere religious commitment Belmontes made during his CYA incarceration. Finally, Miller had testified to Belmontes's ability to make a positive contribution while in prison.

Id. at 891-92 (footnotes omitted). Thus, the lack of testimony may not have been a result of ineffective assistance of counsel. Moreover, despite the majority's insinuation to the contrary, this court has recognized that "residual doubt has been recognized as an extremely effective argument for defendants in capital cases." *Williams v. Woodford*, 384 F.3d 567, 624 (9th Cir. 2004) (*quoting Lockhart v. McCree*, 476 U.S. 162, 181 (1986)).

majority's approach is a failure to recognize that whatever Belmontes's character and childhood experiences, and whatever the effect on him of contracting rheumatic fever at the age of fourteen, this mitigating evidence was unlikely to be meaningful to a jury without — as the majority puts it — "an expert who could make connections between the various themes in the mitigation case and explain to the jury how they could have contributed to Belmontes's involvement in criminal activity." *Id.* at 853. But no expert could form an opinion on how the "themes in mitigation" might "have contributed to Belmontes's involvement in criminal activity," without learning of, and considering, Belmontes's murder of Howard. Accordingly, any expert who might have been able to testify in support of the majority's "themes in mitigation" would have been subject to cross-examination about Belmontes's role in Howard's murder. It seems self-evident that a jury that had already convicted Belmontes of first degree murder would not be swayed by evidence of his difficult childhood when that evidence also reveals to the jury that Belmontes previously committed an execution-stye murder, was only convicted of being an accessory after the fact, and had subsequently told several individuals that he had "wasted that guy."

The majority's rejoinder to this concern is not well conceived. It offers the following line of argument, without any citations to authorities:

> Even were we to reach the question whether the calling of an expert regarding childhood traumas and their effect would open the door to evidence regarding Howard, we would conclude that it would not. Obviously, the expert would know about the instant murder, and thus understand the gravity of Belmontes's criminal conduct. However, an expert's

> opinion as to whether a set of circumstances during an individual's period of emotional development could lead to serious criminal conduct is in no way dependent on whether the defendant committed one or two murders or even on whether he committed any. The critical testimony from an expert is that as a matter of psychological experience and knowledge, certain childhood traumas can result in a person's becoming likely to engage in subsequent criminal conduct, not that they always do and not that they necessarily did in the particular case before the jury. There would be no basis for suggesting that such a professional opinion would be any different if the expert were informed that Belmontes committed two murders rather than one.

529 F.3d at 869 n.20.

What attorney or judge is compelled to accept the majority's unsupported conclusion that the expert's professional opinion would not be "any different if the expert were informed that Belmontes committed two murders rather than one"? Common sense certainly suggests otherwise. Might not the nature of the first murder be relevant to the character of a murderer at the time of the second murder? Wouldn't the fact that Belmontes committed an execution-style murder in 1979 have some impact on his character in 1981? More importantly, wouldn't the prosecution be entitled to ask the expert to explain why the first murder did or did not affect his professional opinion? Thus, even assuming that the knowledge of the Howard murder would not have had any impact on an expert's opinion, the trial court would have had to allow the prosecution to cross-examine the expert on this issue. Accordingly, the jury would have

learned of Belmontes's role in the Howard murder.[6] Try as it might, the majority cannot exorcize the elephant from the room.

III

The majority's approach renders meaningless the standard set forth in our en banc opinion in *Mayfield*. In *Mayfield*, we held that a court "must carefully weigh the mitigating evidence (both that which was introduced and that which was omitted or understated) against the aggravating evidence, *Williams* [*v. Taylor*], 529 U.S. [362,] 397 . . . [(2000)], and determine whether there was 'a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' *Strickland,* 466 U.S. at 695." *Mayfield*, 270 F.3d at 928 (footnote omitted). Although this balancing test gives the defendant the benefit of every doubt, here, the admission of Belmontes's confessions to murdering Howard would have overwhelmed any additional mitigating evidence that the majority argues counsel should have presented. There is no possibility that the admission of the additional mitigating evidence, accompanied as it would be by the aggravating evidence, would have changed any reasonable juror's mind. This conclusion is reinforced by a review of the allegedly mitigating evidence. First, Belmontes's counsel did

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6. Even the lay witnesses that the majority argues counsel should have called would have had to be very careful not to suggest that Belmontes was not violent, as such a suggestion would have allowed the prosecution to question them about the Howard murder. As noted, this is exactly what happened when Belmontes's friend, Robert Martinez, testified that Belmontes was not a violent person. *Belmontes*, 529 F.3d at 881. Belmontes's attorney had to agree that Martinez's testimony would be stricken in order to prevent him from being cross-examined about the Howard murder. *Id.*

present a number of witnesses in an attempt to humanize Belmontes. As noted by Judge O'Scannlain in his dissent, "several aspects of Belmontes's positive childhood characteristics *were* presented: Belmontes's mother told the jury of his 'close' relationship with his sister, his grandfather spoke of Belmontes's devotion to his grandmother, the jury learned that Belmontes had assumed a leadership position on his CYA fire crew and had joined the 'M2' religious program while in CYA custody." *Belmontes*, 529 F.3d at 890.

The inquiry thus becomes what other mitigating evidence might have been proffered. The majority paints the following picture:

> [I]n addition to growing up in a poverty-stricken family in which his father, a profound alcoholic, beat his mother severely and regularly, Belmontes dealt with a host of other traumas. When he was five years old, for example, his 10-month-old sister died of a brain tumor. After her death, Belmontes exhibited symptoms of depression and repeatedly visited the cemetery where she had been buried. In addition to dealing with his father's alcoholism, Belmontes also suffered as a result of his maternal grandmother's alcoholism and prescription drug addiction, which, in combination with her manipulative and controlling behavior, caused constant strife within both his immediate and extended family.
>
> In spite of the adversity he experienced, Belmontes was a kind, responsible and likeable child with a very pleasant demeanor. He was a loving and protective older brother to his two younger siblings, and was kind and respectful toward his maternal grandparents notwithstanding the fact that they disapproved of him on account of his mixed racial

background. He participated in Little League, the Navy Cadets, team sports, and had a paper route. In his early years, he kept up in school, made friends easily, and got along with his teachers.

At age 14, however, Belmontes was beset by rheumatic fever, a condition for which he was repeatedly hospitalized. The disease was significantly debilitating and required him to stop attending school and to terminate his involvement in sports and other social activities. As a result, he was isolated from his peers and unable to pursue the means through which he had formerly escaped his traumatic home life. He was also repeatedly told that, as a result of this condition, he would likely not live past 21 years of age. He became depressed, withdrawn, and lost some of the positive personality traits that seemed to be developing during his early years.

Id. at 851-52 (footnote omitted).

The majority further relates that shortly after Belmontes contracted rheumatic fever, his mother and stepfather divorced, and then comments:

As a result, the family was forced to move into a cheap motel in which Belmontes and four family members lived in "a really small, one-room shack." During this time, their lives were disrupted and unstable. His mother's behavior became erratic. She engaged in casual sexual relations with a number of men, and frequently brought the men back to the motel room in which the family lived.

By the time he was a teen, Belmontes had started using drugs on a regular basis. Around the time of McConnell's murder, he was regularly using

marijuana, heroin, LSD, and PCP.

Id. at 852 (footnote omitted).

There can be little doubt that Belmontes had a wretched childhood. But Belmontes's past included additional aggravating factors as well as the majority's selected mitigating factors. Furthermore, the relevance of the "traumatic experiences" would not have been meaningful to a jury without the use of expert witnesses (who would have had to have been informed of the Howard murder).[7]

The record indicates that in addition to the murder of Howard, there were additional aggravating factors in Belmontes's past that were not presented to the jury. These include his attempt to seize a police officer's gun during an arrest, and his carrying a gun to school because he was having trouble with schoolmates. *Belmontes*, 529 F.3d at 881 n.5. Also, there was evidence that he was a "heavily involved" member of the Black Angels gang, had "a long history of anti-social behavior," had been very fortunate not to have been caught, and was "very manipulative." *Id.* at 889 n.21. There was also some question as to the severity of his rheumatic fever and its effect. One doctor thought the illness was "pretty mild." *Id.* at 885. Belmontes's sister testified that she did not notice any emotional change in him from the illness, *id.* at 887, and his mother stated that he used his illness as an excuse to be lazy. *Id.* at 889.

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7. The majority chastises counsel for failing "to explain to the jury how those experiences affected Belmontes; what the relationship was between the tragic events and Belmontes's subsequent criminal conduct; and why the jury should consider those circumstances in determining whether Belmontes was an individual who should be put to death or whose life should be spared." *Belmontes*, 529 F.3d at 847.

The majority's assertion that at the time that Belmontes murdered Steacy "he was regularly using marijuana, heroin, LSD, PCP and other drugs" is a two-edge sword. The majority
admits that Belmontes was not under the influence of drugs when he murdered Steacy. *Id.* at 865 n.18. Instead, it argues that his "drug use should have been presented to humanize him by showing how the tragic circumstances he experienced while growing up adversely affected him." *Id.* This perspective is contrary to our observation in *Mayfield* that "juries are unlikely to favor defenses based on abuse of dangerous drugs in evaluating a defendant's culpability for violent behavior." 270 F.3d at 931 n.17.

In sum, the record does not support the majority's assertion that there was "a large quantity of mitigating evidence . . . that was never uncovered or presented to the jury." *Belmontes*, 529 F.3d at 851. Rather, the weight and relevance of the additional mitigating evidence was far more problematic than the majority admits. It would have been completely overwhelmed by the evidence of Belmontes's confessions to murdering Howard. Moreover, there is no suggestion that further investigation would have disclosed some previously unknown physical or psychiatric condition or traumatic childhood event. Based on the foregoing, there is no reasonable probability that the additional mitigating evidence could possibly outweigh the aggravating evidence of Belmontes's admissions to murdering Howard and result in a different conclusion by the jury. The majority's contrary assertion seems to render meaningless the standard adopted in *Mayfield*.

IV

In addition, while counsel's approach to the penalty

phase was consistent with the position taken by Belmontes, the majority's newly-created theory is contrary to Belmontes's repeated statements to the jury. Belmontes testified three times during his trial. He first testified during the guilt stage of the trial. *Belmontes*, 529 F.3d at 839. He then testified at the penalty stage and, as the majority notes, "[a]lthough he described his youth as 'pretty hard,' he twice stressed that he did not want to 'use it as a crutch.' " *Id.* at 842. Finally, after the prosecutor's closing argument, the court permitted Belmontes to address the jury, and he reiterated that "although his childhood was not 'a very good childhood,' he did not want to use it as a crutch," and that even though he was now a born-again Christian he also did not want to use that as a crutch. *Id.* at 844-45.

Belmontes attempted to "humanize" himself before the jury by arguing that despite his difficult childhood, he was now taking some responsibility for his actions. The majority attempts to humanize Belmontes by arguing that he was a victim of his upbringing and could not control his actions. The fact that Belmontes's approach failed to convince a jury to give Belmontes life imprisonment does not mean that defense counsel should be faulted for not taking an approach that was inconsistent with Belmontes's position and no more promising.[8] Viewed at the time of the penalty phase of the trial, it would have been blatantly incompetent for defense counsel to abandon an approach that was consistent with his client's perspective in favor of an attempt to blame the murder on Belmontes's traumatic childhood. The reasonableness of defense counsel's action is, of course, influenced "by the

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8. It appears that the cold-blooded, execution-style murder of Howard is contrary to the majority's supposition that Belmontes was subject to uncontrollable fits of anger as a result of his childhood traumas.

defendant's own statements or actions." *Strickland*, 466 U.S. at 691.

V

The majority's exacting dissection of counsel's performance at trial a quarter of a century ago fails to heed the Supreme Court's admonition that the court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. *See also Edwards v. Lamarque*, 475 F.3d 1121, 1127 (9th Cir. 2007) (en banc) (citing *Strickland*, and stating that a reviewing court must consider the circumstances at the time of counsel's conduct, and cannot "second-guess" counsel's decisions or view them under the "fabled twenty-twenty vision of hindsight") (internal citations omitted).

Here, counsel, having succeeded in keeping from the jury the most incriminating evidence in Belmontes's background, appears to have neglected to investigate and develop possibly mitigating factors from Belmontes's youth. However, even at this late date, it is clear that the presentation of the possibly mitigating factors would most likely have resulted in the jury learning of Belmontes's confessions to the murder of Howard. Counsel properly recognized that this evidence would have been "devastating." *Belmontes*, 529 F.3d at 881. Moreover, as noted, the theory of mitigation now advocated by the majority was inconsistent with Belmontes's approach to his defense. Under these circumstances, any failure to investigate and develop mitigating evidence based on Belmontes's wretched childhood was harmless. Belmontes cannot show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." *Strickland*, 466 U.S. at 694.

VI

We should have reheard this case en banc not so much because the majority was not aware of the applicable law, but because its particular view of the facts will make it almost impossible for a court in the Ninth Circuit not to grant a capital defendant a new penalty stage trial any time counsel has to balance presenting additional mitigating evidence against any aggravating evidence that would most likely accompany the mitigating evidence. Competent counsel will decline to present the mitigating evidence, possibly even decline to investigate it, knowing that the Ninth Circuit will secondguess his or her decision, even if the aggravating evidence consists of a confession to a prior murder.

The majority opinion that creates this situation results from a failure to heed the Supreme Court's admonition that the reasonableness of counsel's action must be evaluated as of "the time of counsel's conduct," *Strickland,* 466 U.S. at 690, and the skewing of the balancing test we adopted in *Mayfield*, 270 F.3d at 928. Accordingly, I dissent from the denial of rehearing en banc.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FERNANDO BELMONTES, Petitioner, v. ARTHUR CALDERON, Respondent.	Civ. S-89-0736 DFL JFM MEMORANDUM OF OPINION AND ORDER

I.

Petitioner Fernando Belmontes was convicted of the first degree murder of Steacy McConnell. McConnell's parents found her unconscious on the floor of her residence in Victor, California, on Sunday, March 15, 1981. McConnell died shortly thereafter from cerebral hemorrhaging caused by 15 to 20 blows to her head with an iron dumbbell bar. McConnell suffered defensive injuries to her hands, arms, and feet, and the force of the blows to her head cracked her skull. The house had been ransacked and McConnell's stereo was missing.

A. Evidence presented at the Guilt Phase

1. Prosecution's case

Belmontes was spending the weekend in Lodi with his friend Bobby Bolanos. Both knew Domingo Vasquez, who was acquainted with McConnell. On Tuesday of the week preceding the murder, Vasquez, Bolanos, and others had spent the evening "partying" at McConnell's house. Bolanos left early Wednesday morning. When Bolanos and Belmontes ran into Vasquez that Friday, he told

them that he had stolen some "black beauties" – methamphetamine pills – from McConnell and that she had kicked him out of her house.

Bolanos testified against Belmontes at trial and pled guilty to burglary in exchange for immunity from prosecution for felony murder. Bolanos testified that on Sunday morning, he and Belmontes drove to Vasquez's house in Bolanos' car, a black 1967 Chevrolet. When they arrived, Vasquez was talking on the phone with McDonnell. After Vasquez hung up, he informed them that McConnell's parents were coming to pick her up and that she would be gone all day. Belmontes, Bolanos and Vasquez were all short of funds, and they agreed to burglarize McConnell's residence, steal her stereo, and "clean house." Vasquez's girlfriend Karrie Lynn Rogers, testified that as the men departed Belmontes carried with him an iron dumbbell bar that she used as a tortilla roller.

The three men traveled to Victor in Bolanos' car. They agreed that Bolanos and Vasquez would wait in the car a short distance from the house, while Belmontes entered the house alone to collect valuables and place them near the rear door. In accordance with the plan, Bolanos and Vasquez waited about 5 minutes before driving up to McConnell's house and backing into the driveway. Vasquez got out to open the trunk but was unable to find the right key. When Bolanos got out to help him, he heard repeated banging noises coming from within the house. Bolanos opened the trunk and then waited in the car while Vasquez walked up to the front door. Shortly after Vasquez entered the house, he and Belmontes emerged carrying stereo components. According to Bolanos, Vasquez looked "like he had seen a ghost," while Belmontes had blood on his face and his pants. Belmontes told Bolanos that he "had to take out a witness," because McConnell was home. He explained

that McConnell had heard Bolanos and Vasquez drive up, and when she turned to look out the window, Belmontes hit her with the bar.

Lucy Flores, a neighbor of McConnell's, saw Bolanos' car back into McConnell's driveway on the morning of the murder.
She observed a man get out of the passenger seat and try to unlock the trunk. He appeared to have trouble with the lock, whereupon the driver got out of the car and unlocked the trunk. The driver got back in the car, while the passenger walked toward the house and met a third man. Flores did not see where the third man had come from. Shortly, she saw the two men exit the back door of McConnell's house, carrying stereo equipment, which they loaded into the trunk before getting in the car and driving off.

Bolanos testified that en route to Galt, where they intended to fence the stereo, Belmontes wiped blood off of the metal bar and his shoes. The men agreed to dispose of the bar by throwing it from a bridge into the Mokelumne river. Bolanos later led police to the spot on the river bank from which the bar was recovered. The men went to the home of Domingo's brother, Manuel Vasquez, where Belmontes changed into a borrowed pair of pants. Raul Barron was contacted, and met the men at the home of Irma Vasquez, Domingo's sister. Barron purchased McConnell's stereo components for $100. Barron testified that he paid the $100 to the man in the baseball cap (Belmontes), who did most of the talking during the transaction.

Bolanos' girlfriend, Teresa Cobarrubio, testified that Bolanos gave her $15 that same day from the proceeds of the sale of the stereo. Bolanos appeared scared, and told Cobarrubio that he, Belmontes, and Vasquez had

burglarized McConnell's home. The following day, Bolanos and Cobarrubio read a newspaper account of McDonnell's murder, and Bolanos related further details of the crime. He told Cobarrubio that he had remained in his car and that Belmontes had exited from the house with blood all over his clothes and stated that he "had to take a witness out."[1/]

The day after the murder, Vasquez called Bolanos to advise that he had been questioned by the police in relation to McConnell's murder. Bolanos and Belmontes went to Vasquez's house and talked in the living room. Carrie Lynn Rogers, Vasquez's girlfriend, who subsequently married him, and who was a cousin of Bolanos', testified that from the kitchen she overheard the men discussing the crime, and, specifically, that she heard Belmontes describe how he had entered the house alone and hit McDonnell multiple times with the bar before Vasquez joined him in the house.

After the meeting at Vasquez's house, Belmontes phoned his girlfriend, Barbara Murillo. Murillo testified that he told her he was in trouble. He said that he had gotten into an argument with McDonnell at her house, become angry, and hit her, and that she fell and "went to sleep," although he "didn't mean for her to go to sleep." (RT 1710:20-1711:17.)

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1. Cobarrubios also testified that she recalled running into Barbara Murillo, Belmontes' girlfriend, at the Grape Festival several months after the murder. Murillo asked if Belmontes had committed the murder. Cobarrubio responded affirmatively. Murillo then asked if she thought Belmontes "might have been set up." Cobarrubio replied: "well, he might have." Cobarrubio testified that she had no information that suggested Belmontes had been set up, but answered as she did because she felt sorry for Murillo. (See RT 1489-1495.)

Petitioner fled to Southern California, where he was arrested pursuant to a warrant six days after the murder. Blood found on one of his shoes was tested and found to match McConnell's blood type.

Belmontes furnished three tape-recorded statements to police in the three days after his arrest. He initially denied any involvement in a plot to burglarize McConnell's house.[2/] In the second session, he admitted to the burglary, and acknowledged having entered the house alone, but denied having hit McConnell. In his third statement to police, Belmontes admitted to having hit McConnell, but insisted that he did so only once, on the right side of her head, and only after Vasquez entered the house and told him to. Belmontes stated that the first blow caused McConnell to fall down, and that he then proceeded to search the house for valuables, leaving Vasquez alone with McConnell.

Belmontes was unable to explain how McConnell acquired the additional 14 to 19 bludgeoning injuries on the left side and back of her head, and expressed disbelief

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2. While speaking with Detective Holman, Belmontes denied having been at McConnell's house after the end of February, and specifically denied having planned to burglarize her home on the morning of March 14:

Holman:	Let me ask you this: Do you remember being over at Domingo's house on Sunday morning and talking about going over to Steacy's house to rip her off?
Belmontes:	Sunday morning?
Holman:	Yeah. Last Sunday morning.
Belmontes:	Rip her off?
Holman:	Yeah.
Belmontes:	Huh uh. (Negative) Wasn't talking about that or nothing.

(RT 1784:18-27.)

that she had been hit so many times.[3] He stated at one point that Vasquez had hit McConnell, but elsewhere in the same session told police that he did not see or hear Vasquez strike McConnell during the time that he was searching the apartment. (See RT 1819:3-8; 1850:22-1851:5.) Belmontes admitted that he had gotten blood on his pants, that he had not seen any blood on Vasquez, and that only he had changed pants when they arrived at Manuel Vasquez's house. (RT 1861:2-19.)

The pathologist who performed the autopsy on McConnell, Dr. Maduros, testified that the first blow, to McConnell's right temple, was of much less force than the others, and likely was of insufficient force to render her unconscious. (See RT 1751:7-1753:8; 1759:15-26.) Dr. Maduros also testified that McConnell had defensive injuries on her hands, arms, and feet, which indicated that she had been conscious through some portion of the attack after the first blow. (See RT 1754:2-1756:14.)

2. Defense case

Belmontes' theory at trial was that Vasquez was the

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3. The transcript of Belmontes' third police interview contains the following exchange:

Holman:	Let me ask you; you know I am having a hard time figuring out how she got so many blows on her head.
Belmontes:	Hey that freaked me out.
Holman:	By the same weapon, I mean they appear to be all caused by the same weapon. I don't know, what do you think happened?
Belmontes:	I really don't know man. That shocked the shit yesterday when you told me that it was about 20 times . . . I can sincerely say that I didn't get her no damn 20 times.

(See RT 1848:6-22.)

killer, and that he must have dealt the additional blows to McConnell while Belmontes was searching the back rooms of the house. Belmontes testified that after he, Bolanos and Vasquez agreed to steal McConnell's stereo, they drove to Victor and parked a block away from McConnell's house. Belmontes walked to McConnell's house and knocked on the door. He stated that when she answered the door, he abandoned his intent to burglarize the house, but entered at her invitation to avoid arousing suspicion. Belmontes and McConnell stood by the table talking while she ironed clothes.

Five minutes after Belmontes entered the house, Bolanos and Vasquez pulled into the driveway. McConnell started walking toward the front door. Belmontes followed behind her. Vasquez rapped on the door. According to Belmontes, the sequence of events was such that, after pulling up, Vasquez must have promptly come to the front door; under Belmontes' version, Vasquez would not have had time to go to the trunk of Bolanos' car, as both Bolanos and the neighbor, Lucy Flores, testified.

Vasquez pushed the door open, saw McConnell, and ordered Belmontes to "hit her." Belmontes did as he was told, and hit McConnell in the side of the head with the bar. She fell to the floor, and Belmontes dropped the bar. Belmontes then ran to the back bedroom, broke down the door, searched that room and the kitchen, and returned to the living room. Upon returning to the front of the house, Belmontes saw Vasquez standing in the same spot holding the metal bar. He had not seen Vasquez hit McConnell nor heard any blows landing, because he was not paying attention. He could not explain the presence of defensive bruises and contusions on McConnell's hands, arms, and feet.

Belmontes and Vasquez exited the house carrying McConnell's stereo components, which they placed in the trunk of Bolanos' car. Vasquez got in the back seat, and Belmontes rode in the front, next to Bolanos, who drove. Belmontes testified that Vasquez handed him the steel bar, stating that he had to take out a witness. The bar had blood, flesh and hair on it. Petitioner wiped blood off the bar using his gloves and set it down on the floor. He denied having wiped any blood off of his shoes. Bolanos and Vasquez told him to throw the bar out his window into the river, and he complied.

The three drove to Manuel Vasquez's house, where Belmontes changed into a pair of Manuel Vasquez's pants because his had blood on them. After selling the stereo to Raul Barron for $100, the three men drove to Lodi, divided the money, and bought some beer. They drove to Domingo Vasquez's house, where Vasquez allegedly changed his pants. They then drove to the home of an acquaintance to purchase narcotics.

Belmontes' girlfriend, Barbara Murillo, testified that she ran into Cobarrubio at the Grape Festival six months after the murder. Murillo testified that she believed at the time that Belmontes was the murderer. But when she asked Cobarrubio for further details about the crime, the latter claimed that Belmontes had been "set up" because he had no backup in the area, while Vasquez had a network of local friends.

The jury convicted Belmontes of first degree murder, and made special findings that Belmontes personally committed the murder, that the murder was wilful, deliberate, premeditated, and intentional, and that the murder occurred during the commission of the crime of burglary. The case then proceeded to the penalty phase.

B. Evidence presented at the penalty phase

1. Evidence in aggravation

At the penalty phase, the prosecution introduced evidence of (i) Belmontes' acquisition of a handgun by threat, in 1979; (ii) his carrying the gun for protection shortly thereafter; (iii) his April 1979 conviction as an accessory after the fact to voluntary manslaughter; (iv) an altercation with another inmate during Belmontes' incarceration in a county youth facility; (v) a domestic assault on Barbara Murillo in the month preceding McConnell's murder; and (vi) autopsy photographs depicting McConnell's fatal injuries.

(i) Acquisition of the handgun

William Cartwright, the manager of a motel in Ontario, California, testified to an incident in early 1979 in which an individual identified as Rudy met Belmontes at the motel and offered to sell him a .32 caliber automatic handgun that he had acquired in a burglary. Belmontes examined the loaded weapon, and then cocked the trigger and pointed it at Rudy, stating: "I've got it now. Why buy it?" Rudy left the premises and Belmontes retained the weapon.

(ii) Carrying the gun

Steven Cartwright testified that he had a conversation with Belmontes in February 1979 in which Belmontes stated that some people were upset with him. As Belmontes said this, Cartwright testified, he indicated that he had a gun in his belt, by
slapping his side, and stated that he was not concerned because he had all the protection he needed.

(iii) Prior conviction

The prosecution and defense stipulated that Belmontes pled no contest in April 1979 to a charge of being an accessory after the fact to voluntary manslaughter, in the death of a Jerry Howard.[4]

(iv) Altercation with other inmate

In May 1979, defendant was a ward in a California Youth Authority facility under the supervision of group counselor Ron Cutler. Cutler testified to an incident in which he observed Belmontes and another ward preparing to fight. Cutler testified that Belmontes, who was significantly smaller than the other youth, was about to hit the other with a chair when Cutler intervened and knocked the chair away.

(v) Domestic violence

In February 1981, Belmontes was living with his two year old daughter and the girl's mother, Barbara Murillo, who was then four months pregnant with their second child. Murillo testified to an argument that escalated into an altercation between Belmontes and Murillo when Murillo told Belmontes to leave their apartment. Belmontes pushed Murillo and hit her in the head, at one

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4. The court did not permit the prosecutor to introduce evidence that Belmontes had actually murdered Jerry Howard, execution-style. (See RT 2239:1-3; 2262 16-18.) The prosecutor's proffer included: (i) testimony from an eyewitness who was prepared to testify that he saw Belmontes shoot Howard; (ii) testimony from a counselor at a California Youth Authority camp that Belmontes had confessed to killing Howard after receiving parole for his accessory conviction; (iii) testimony from another individual who had seen Howard get into a car with Belmontes on the evening he was killed; and (iv) testimony from a police officer who found the murder weapon at Belmontes' house. (See RT 2239:8-2240:27; 2261:10-25.)

point causing her to drop their daughter. After pushing her to the ground, Belmontes attempted to choke her, before the two were separated by friends who were present. When Murillo started to call the police, Belmontes cut the telephone cord with a knife. Murillo at one point fled the apartment through a window, but Belmontes dragged her back to the vicinity of the apartment. A neighbor eventually summoned police, who arrived as Belmontes was leaving the apartment.

2. Evidence in mitigation

Belmontes' maternal grandfather, Michael Salvaggio, testified that his daughter was sixteen when she married Belmontes' father. Belmontes' father was unemployed, and unable to support his family, requiring extensive financial support from Salvaggio. When Salvaggio got the elder Belmontes a job, he was still unable to support his family because he "drank it away." (RT 2315:1-10.) Salvaggio characterized Belmontes' young life as "terrible," and marked by physical abuse of Belmontes' mother, including a broken arm. (RT 2315:11-2316:2.) Salvaggio also testified that Belmontes had a wonderful relationship with his grandmother, who died in 1978. After Belmontes' grandmother nearly drowned while swimming, she lingered in a coma for two weeks before dying, and Belmontes visited her almost every day in the hospital.

Belmontes' mother, Carol Belmontes, testified that her marriage to Belmontes' father was an unhappy one. He "wouldn't ever work," and was an alcoholic, who beat her. (RT 2324:18-26.) he broke her arm once, and stabbed her on another occasion. Mrs. Belmontes' marriage to him lasted about 11 years, and she remarried after she and Mr. Belmontes were divorced. Her second marriage broke up five years later, when Belmontes was fifteen. After

that, he became hard for her to control.

Mrs. Belmontes testified that Belmontes had remained very close to her and to his sister. Mrs. Belmontes' testimony concluded with the following exchange:

Q: What kind of qualities can you recommend to this jury as they consider his faith [sic]?

A: I don't believe that he should go to the gas chamber.

Q: Just because you're his mother?
A: No. I don't believe he did it.

Q: Are you aware of the facts of this case?

A: (Affirmative nod) I know my son.

Mr. Schick: I have no more questions.

(RT 2327:16-20.)

Robert Martinez, a close friend of Belmontes' since their early teens testified on Belmontes' behalf. He testified that he and Belmontes spent a great deal of time together, working on Martinez's low rider car, and occasionally smoking marijuana and drinking beer. Belmontes served as best man at Martinez's wedding, and was someone who Martinez would go talk to when he had problems with his wife.[5]

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5. Martinez testified that Belmontes was not a violent person. However, that testimony was stricken, on objection from the prosecutor, who argued that if Martinez's opinion evidence were admitted then the prosecutor should be permitted to introduce evidence of Belmontes' participation in gang violence and his alleged execution-style killing of Harmon.

Martinez's wife Darlene testified that she considered Belmontes a close friend. She was a born-again Christian. When Belmontes visited with Mr. and Mrs. Martinez after his release from the California Youth Authority, he advised her that he too was a born-again Christian. He also mentioned his struggling relationship with Murillo and expressed concern that she was not Christian.

Belmontes testified in his own behalf. He testified that his father used to hit his mother frequently, and often came home drunk. Although he acknowledged the difficulties in his childhood, Belmontes indicated that he did not want to use his childhood "as a crutch, to say I am in a situation right now, I'm here because of that." (RT 2343:25-27.) Belmontes testified about his time in the California Youth Authority Pine Grove Camp, and his acceptance of Christianity through his involvement in the M-2 Christian sponsorship program. Belmontes testified that he initially entered that program as a way to get occasional time away from camp, but that he was touched by the decency of his M-2 family, the Haros, and so gradually became curious about Christianity and eventually embraced it. Belmontes testified that, although initially ranked as a the last man on the fire crew, he managed to work his way up to number 2 man after his involvement withe the M-2 program helped him to "straighten my head out." (See RT 2347:27-2348:17; 2355:3-9.) After his parole from the Youth Authority, Belmontes got a job with the United States Forest Service and rented an apartment with Barbara Murillo near Lodi, in part so that he could be near his M-2 sponsors, Fred and Beverly Haro. Belmontes testified that he had trouble maintaining his religious commitment from that point on, and started "going back to [his] old ways." Belmontes testified that, if sentenced to prison, he planned to "get into music," "read a lot," and "just try to stay alive." (RT 2357:24-2359:26.)

The Reverend Dale Barrett testified that he knew Belmontes from Belmontes' participation in the M-2 program, under which an inmate at the Youth Authority facility would be matched with a local family and spend time in the family's home on Wednesday and weekends. Barrett matched Belmontes with the Haros. Belmontes participated in church activities "to a very high degree," (RT 2379:24-25), and was "one of the more sociable young men involved in the church." (RT 2380:1-2.) Belmontes was eventually baptized during his time in the Youth Authority camp. Barrett testified that his church is very selective about baptism, and that it is based on "how serious we feel they are about the commitment they have made." (RT 2380:15-2381:5.) Only a small percentage of participants are baptized. Barrett felt that Belmontes' participation in the program and religious conversion was sincere, and that Belmontes was not among those participants who are motivated primarily by the desire to get away from the camp. Barrett testified that he believed in the death penalty, but thought it inappropriate in this case because he saw Belmontes as "salvageable," (RT 2384:1-11), and because he thought premeditation "a debatable point" in this case.

Don Miller, assistant chaplain at the Youth Authority's Preston Facility and the Northern California Director of the M-2 program testified that Belmontes had been helpful to the program on several occasions since his release from Pine Grove, when he visited Preston and spoke with wards there about "what it was like on the outside," to help prepare them for release. Miller testified that if Belmontes were imprisoned for life, he anticipated using Belmontes to counsel "other men in the prison so that other fellas when they get out don't get into the same thing that he has gotten into." (RT 2397:5-7.)

The Haros testified to their relationship with

Belmontes when he was incarcerated at Pine Grove and after his release. Belmontes was in their home for three days each week for much of the year he spent at Pine Grove. Fred Haro spent quite a bit of time talking with Belmontes, "about his home, his life, what his plans were, where he was going, what he wanted to do, and that kind of counseling." (RT 2402:25-27.) Haro testified that Belmontes responded very well to the program, and that Belmontes had been a very good influence on the Haros' teenage son, who was experiencing some problems. Fred Haro also testified that he was "strongly for the death penalty" but believed that it was inappropriate in this case because he believed that Belmontes was innocent. Beverly Haro testified that she saw Barbara Murillo as a "definite negative factor in Fernie's life." (RT 2416:6-26.)

C. Procedural History

Belmontes was convicted of first degree murder on August 6, 1982. On October 6, 1982, the court sentenced Belmontes to death. On June 23, 1988, the California Supreme Court affirmed the judgment. See People v. Belmontes, 45 Cal.3d 744, 248 Cal. Rptr. 126 (1988). The United States Supreme Court denied Belmontes' petition for writ of certiorari on January 13, 1989. See Belmontes v. California, 488 U.S. 1034, 109 S. Ct. 848 (1989) (Mem.).

Belmontes filed a petition for writ of habeas corpus with this court in May, 1989. Later that year, petitioner filed a state habeas petition and received a stay of execution from the California Supreme Court. This case was administratively closed during petitioner's state court proceedings. On June 29, 1993, this case was reopened. On February 16, 1994, petitioner filed an amended petition . On November 4, 1994, petitioner filed a second amended petition. In May 1995 the court denied respondent's motion to dismiss.

The second amended petition asserts 23 claims, in two parts. Part A asserts 14 claims related to the guilt phase, and Part B asserts 9 claims related to the penalty phase. On July 24, 1995 petitioner filed a motion for summary judgment on the following claims: A-5 through A-7, A-9, A-13, A-14, B-2 through 5, B-7, and B-8. Respondent opposed the motion and filed a cross motion for summary judgment on August 25, 1995. On September 30, 1996, the Magistrate Judge denied petitioner's motion for an evidentiary hearing on certain other claims; whereupon petitioner filed a memorandum of law seeking summary judgment on claims A-1 through A-4, and B-1. (See Mem. Points and Authorities, filed November 6, 1996, at 2 (characterizing petitioner's motion as "the functional equivalent of a summary judgment motion").) Respondent opposed the motion and moved for summary judgment.

On February 1, 2000, the court withdrew the referral of this case and the pending motions from the assigned magistrate judge. The court now denies petitioner's motions for summary judgment, and grants respondent's motion. The petition is therefore denied with respect to all claims except the six that the parties have not yet briefed, claims A-8, A-10 through 12, B-6, and B-9.

II.

Belmontes seeks summary judgment on ten claims arising out of his guilt phase trial and seven claims arising out of the penalty phase.

A. Guilt Phase

1. Claim A-1

Belmontes argues that he was deprived of due process

by the prosecutor's failure to disclose material benefits conferred on Bobby Bolanos, and by the prosecutor's failure to correct false or misleading testimony by Bolanos about those benefits. According to Belmontes, the prosecutor arranged for the dismissal of drunk driving charges arising out of an incident that occurred one week prior to the murder of Steacy McConnell. Defense counsel was not informed of the dismissal of these charges before trial, which may have violated the prosecutor's duty to disclose benefits conferred on witnesses in exchange for cooperation. See Giglio v. United States, 405 U.S. 150, 153-54, 92 S. Ct. 763, 766 (1972); Singh v. Prunty, 142 F.3d 1157 (9th Cir. 1998).

The evidence of the dismissal of drunk driving, hit and run, and other charges against Bolanos could have been used to impeach Bolanos, and thus should have been disclosed. See Singh, 142 F.3d at 1161.[6] The prosecutor's failure to disclose the benefits given to Bolanos in exchange for his testimony, however, violated Belmontes' right to due process only if the undisclosed evidence was material. See Singh, 142 F.3d at 1161. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985).

On this record, there is not a reasonable probability

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6. It is undisputed that the dismissal of Bolanos' drunk driving and hit and run charges was secured by Mr. Sueyres, the prosecutor in Belmontes' case. Respondent argues that the prosecutor was under no duty to disclose the dismissal of the traffic offenses because the dismissal was not part of the consideration for Bolanos' testimony, but was a gratuitous act on the part of the prosecutor. (See Return at 54-68.) However, so long as Bolanos knew or suspected that he was receiving a benefit from the prosecutor, the evidence could be impeaching, whether or not the benefit was part of the plea bargain.

that had the prosecutor disclosed the evidence in question, the result of the trial would have been different. In contrast to Singh, it was already clear to the jury here that Bolanos had received significant benefits form the prosecutor, and that he was not testifying out of altruism. Cf. Singh, 142 F.3d at 1162. Although Bolanos could have been prosecuted for felony murder, the jury heard the details of his plea agreement, and defense counsel impeached him on cross examination with the fact that murder charges against him had been dismissed in exchange for his testimony and his guilt plea to a burglary charge. The additional impact on his credibility of disclosure of the dismissal of relatively minor misdemeanor traffic charges could not have amounted to much.

Belmontes argues that the prosecutor's failure to disclose was compounded by Bolanos' false or misleading testimony about the dismissals and about his previous arrest record. A prosecutor must correct testimony given by a prosecution witness that the prosecutor knows to be false or misleading. See United States v. Bagley, 473 U.S. 667, 678, 105 S. Ct. 3375, 338-82 (1985). When asked about an inconsistency[7] between his trial testimony and his first statement to police, Bolanos explained it by saying that "I didn't have my head straight [during the interrogation] . . . there was a lot of investigators there . . . and the DA and you know, cops and whatever. That's the first time I got busted. I wasn't even thinking then." (RT 1449:28-1450:5.) This statement may have been untrue, depending on what Bolanos meant by "busted."

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7. The inconsistency concerned the length of time that Belmontes was in the house alone. Although Bolanos initially told the police it was 20-30 minutes, at trial, he testified that it was about five minutes. (See RT 1449:20-1450:6.)

The prosecutor in Belmontes case, Clark Sueyres, knew of Bolanos' arrest for drunk driving, as Sueyres personally appeared in court to dismiss the drunk driving charges against Bolanos, in which Bolanos had been arrested just a week before his arrest and interrogation in the McConnell murder. Sueyres was thus under a duty to correct Bolanos' statement that his second arrest in one week's time was "the first time I got busted." Although this correction, if made, may have helped to impeach Bolanos, the impeachment on a minor point would not have been significant.

In light of the other, overwhelming evidence of Belmontes' guilt, the failure of the prosecutor to correct the misleading statement or disclose the dismissal of the drunk driving charge was harmless beyond a reasonable doubt. Petitioner seeks to portray the trial as little more than a swearing contest between him and Bolanos as to whether Belmontes or Vasquez was the perpetrator of the fatal blows, but, in fact, other evidence supported Bolanos' testimony, and undercut Belmontes'. First, Bolanos testified that after he pulled into the driveway, Vasquez exited the car, and tried to open the trunk. Vasquez could not find the right key, and Bolanos eventually had to help him, after which Vasquez went up the porch steps and into the house. Bolanos' testimony was substantially corroborated by the testimony of McConnell's neighbor, Lucy Flores, who watched the passenger get out of Bolanos' car and try unsuccessfully to open the trunk, eventually prompting the driver to come to his assistance. Belmontes, however, testified that for his version of events to be true, Vasquez must have come to the door immediately after Bolanos' car pulled into the driveway, and that Vasquez "didn't have time to open the trunk." (See RT 2023:8-13.) Second, Dr. Maduros, the pathologist, testified at trial that the blows that cracked McConnell's skull would have made a sound

"like a cracked pot." (RT 1748:21.) This testimony was consistent with Bolanos' testimony that when he and Vasquez were opening the trunk, he heard a repeated "banging noise" coming from inside the house. (RT 1391:22-28.) Belmontes testified that he had hit McConnell once with the iron bar, and then dropped the bar, leaving McConnell alone with Vasquez while he searched the back bedroom and kitchen area. Yet Belmontes testified that he had heard no unusual sounds while he was searching the small home. (See (RT 19999:16-21.) Third, Belmontes was unable to explain how McConnell acquired the extensive defensive injuries on her hands, arms, and feet if, as he said, he knocked McConnell unconscious with one blow, and Vasquez subsequently delivered the fatal blows to her head. Moreover, Dr. Maduros' testimony was inconsistent with Belmontes' claim that his single blow to the right temple knocked McConnell unconscious. (See RT 1759:15-26.) Finally, there was no dispute that it was Belmontes who took the murder weapon into McConnell's home, emerged covered with blood, unlike Vasquez and Bolanos, negotiated the sale of the stolen items, and gave false exculpatory statements to the police. In short, there is no reasonable likelihood that impeachment regarding Bolanos' "first time I got busted" comment or the dismissal of drunk driving charges would have led the jury to believe Belmontes' incredible tale over Bolanos' which was corroborated in crucial respects by other witnesses and physical evidence.

2. Claim A-2

Belmontes argues that he was deprived of due process by the prosecution's use of inculpatory statements that were allegedly involuntary because of police coercion. According to petitioner, the police made threats about the death penalty if he did not confess and offered the hope of

leniency if he did.

Petitioner made three separate statements to police after his arrest, two while in jail in Ontario, California, and one after he was returned to San Joaquin county. The statements were tape recorded. This claim is based on Belmontes' allegation that the police detectives who interrogated him made threats regarding the death penalty or promises of leniency during the two to three minute interval between his first and second tape-recorded statements, and thereby rendered his subsequent statements involuntary. The transcripts of petitioner's tape recorded statements to police, however, directly contradict the claim that the police made either threats or promises to induce Belmontes to talk. At the beginning of petitioner's second statement, petitioner expressly stated that the detectives had not threatened him, and had not promised him anything, and that they were resuming the interview at his request. (See RT 1799:1-1800:4.)

Based on this evidence, the California Supreme Court held that "our independent review convinces us that no improper threats or promises of leniency were made to defendant. Deputy Holman testified that he did not, as defendant contends, 'threaten him with the death penalty.' Deputy Cooper's best recollection was that the term 'death penalty' may have been mentioned at some point, but that if it was, it was not done so with intent to scare or coerce defendant into confessing." People v. Belmontes, 45 Cal.3d 744, 248 Cal. Rptr. 126, 140 (1988). Moreover, the Court held, "defendant's own responses at the beginning of his second tape-recorded statement support the officers' testimony that he was not 'threatened' with the death penalty, nor were any promises of benefit or leniency offered as inducement for his statements." (Id.) Although the ultimate issue of

voluntariness may be viewed as a mixed question of law and fact, warranting independent review under the Pre-AEDPA version of § 2254(d), cf. Thompson v. Keohane, 516 U.S. 99, 106, 116 S. Ct. 457, 462 (1995), the state Supreme Court's underlying factual finding – that no improper threats or promises were made – is a pure factual finding, entitled to deference. Id.; see also Townsend v. Sain, 372 U.S. 293, 306 n.6, 83 S. Ct. 745, 756 n.6 (1963).

3. Claim A-3

Petitioner argues that he was deprived of the effective assistance of counsel by his attorney's failure to challenge the validity of the arrest warrant and the seizure of his blood-stained shoes at the time of arrest. Petitioner argues that the affidavit filed in support of the arrest warrant lacked probable cause, because it was based solely on the "inherently unreliable" statement of an accomplice, Bobby Bolanos, and because it omitted material facts. (See 1996 Mem. in Supp. at 9; Traverse at 17-19.) Because petitioner's claim is based on ineffective assistance of counsel, he must show that counsel's failure to bring a motion to suppress on these grounds fell below "the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, and that he suffered prejudice as a result. See Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994).

Although an accomplice's motives are often suspect, "even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case." Gates, 462 U.S. at 234, 103 S. Ct. at 2330. An affidavit based on an informant's statement supplies probable cause where "corroboration

through other sources of information reduced the chances of a reckless or prevaricating tale, thus providing a substantial basis for crediting the hearsay." Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317 (1983) (citations and internal quotation marks omitted). Here, as the California Supreme Court noted on direct appeal, "the circumstances of the crime scene - as summarized in the affidavit - corroborated Bolanos' statements." People v. Belmontes, 45 Cal.3d 744, 768 248 Cal. Rptr. 126, 137 (1988). The affiant indicated that McConnell's house had been "ransacked," and Bolanos stated that the murder had taken place during a burglary. The autopsy report that was incorporated into the affidavit indicated that McConnell's death was caused by "blunt trauma to the head," and Bolanos stated that defendant had beaten the victim with an iron bar. The detailed, first hand nature of Bolanos' description of the crime was sufficient to establish probable cause for the issuance of a warrant. Because the affidavit established probable cause for the issuance of the warrant, Belmontes had not established either deficient performance or prejudice.

Second, petitioner argues that material information was omitted from the affidavits which might have caused the judge who issued the warrant to question Bolanos' credibility. The primary fact identified by petitioner in this regard is that McConnell's neighbor, Lucy Flores, had seen Bolanos' car at the place and time of the crime. It is not obvious that this fact would diminish Bolanos' credibility. Petitioner suggests that it would show that Bolanos was "a cooked goose," but the judge knew this already, in light of the statements recounted in the affidavit in which Bolanos confessed his involvement in a felony, the burglary of McConnell's house, that resulted in a murder. Indeed, had the affidavit fully recounted the information provided by Flores, it would have provided further corroborating detail, such as the fact that Bolanos

remained with the car, and never entered McConnell's home. Similarly, had the affidavit included details of Teresa Cobarrubio's statement to police, it would have reinforced, not undermined, the version of events provided by Bolanos, by showing a prior consistent statement on Bolanos' part. In sum, none of the omissions identified by petitioner undermine the judge's finding of probable cause.

4. Claim A-4

Belmontes argues that he was deprived of due process and the effective assistance of counsel due to a conflict of interest that resulted from his counsel's prior representation of Mr. Vasquez. Before the cases against Belmontes and Vasquez were severed for trial, Vasquez's counsel moved to disqualify Schick as counsel for Belmontes, on the basis of a possible conflict of interest, because a member of Schick's firm had represented Vasquez in a 1979 murder charge that had been dismissed. Schick filed a declaration stating that he knew no confidential information concerning the murder charge, he had not appeared on behalf of Vasquez in that case, and the file in the murder case had been destroyed over eight months earlier. The state court denied the motion, noting "the lack of real contact Mr. Schick had or anyone in his office has had that has remained in the office with Mr. Vasquez." (Add. RT at 105:13-108:16.)[8/]

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8. Although Belmontes waived any objection to the conflict, he now argues that trial counsel's failure to disclose the extent of the conflict invalidates the waiver. "Waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case." Id. The context of Belmontes' waiver establishes that he was unaware of "the significance of the conflict," id. at 1500, because he did not realize

The subsequent investigation by Belmontes' habeas counsel has revealed that the prior representation of Vasquez was more extensive than Schick disclosed at the time of Vasquez's motion. Seven years before Belmontes' trial, Schick himself had represented Vasquez at the preliminary hearing stage of a firearm prosecution of Vasquez, when Schick was a deputy public defender. Schick does not remember the facts of the case or any discussion with Vasquez. Moreover, both of Schick's former partners in the law firm of Riddle, Schick and Jacobsen also represented Vasquez while working as deputy public defenders prior to the formation of the partnership. Mr. Riddle represented Vasquez in a 1974 rape case, and Mr. Jacobsen represented him in a 1976 robbery prosecution. Schick was not aware of the rape case during his representation of Belmontes. However, Schick did remember at the time of the recusal hearing that he and Jacobsen had both represented Vasquez when they were in the public defender's office, but he did not volunteer that information to the court or to Belmontes, apparently on a view that these matters were too remote and unrelated to be of relevance. (See Respondent's Exhibits in Support of Return, Exh. C at 3:10-25; 6:1-6.)

Although Schick's primary theme at trial was that Vasquez was the actual killer, Belmontes claims that Schick pursued this defense half-heartedly, relying on the "safe harbor" of evidence produced by the police investigation into the crimes, rather than independently investigating Vasquez's background. According to Petitioner, "there existed a substantial corpus of evidence which would have strongly supported petitioner's trial defense but which was potentially adverse to Vasquez's

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that Schick had personally represented Vasquez, even though the representation was at a preliminary stage and involved a distinctly different matter. Thus, his limited waiver does not bar this claim.

legal interests, and . . . that evidence was neither disclosed by trial counsel to the court, nor was it investigated or presented to the jury." Specifically, Belmontes argues that Vasquez had a history of retaliatory violence that could have been used to impeach Bolanos with respect to a possible motive for falsely pinning the murder on Belmontes.[9/] Thus, according to Belmontes, had he been permitted to present character evidence as to Vasquez, he could have impeached Bolanos.

The Sixth Amendment guarantee of effective assistance of counsel comprises two correlative rights: the right to counsel of reasonable competence, and the right to counsel's undivided loyalty. Mannhalt v. Reed, 847 F.2d 576 (9th Cir. 1988) (citations omitted). "To establish a sixth amendment violation based on a conflict of interest the defendant must show 1) that counsel actively represented conflicting interests, and 2) that an actual conflict of interest adversely affected his lawyer's performance." Id.; see also Cuyler v. Sullivan, 446 U.S. 335, 348-50, 100 S. Ct. 1708, 1718-19 (1980). Unlike a challenge to counsel's competency, prejudice is presumed if the defendant demonstrates that counsel "actively represented conflicting interests," Cuyler, 446 U.S. at 350, 100 S. Ct. at 1719, and that such an "actual conflict of interest adversely affected his lawyer's performance." Id. at 348, 100 S. Ct. at 1718; see also Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067

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9. The California Supreme Court found that there was no actual or potential conflict of interest, and rejected petitioner's argument that Schick's representation of petitioner may have been compromised, noting that the primary defense theory at trial was that Vasquez was the ringleader. See 248 Cal. Rptr. at 141-42. The court noted that Vasquez's criminal history would not likely have been admissible, and concluded that "the record contains no informed basis for concluding that a conflict of interest existed or affected trial counsel's performance to defendant's detriment." Id.

(1984).[10]

Once a petitioner has shown that an actual conflict existed, "the defendant need only show that some effect on counsel's handling of particular aspects of the trial was 'likely'." Miskinis, 966 F.2d at 1268. Failure to put on a certain defense or particular witnesses may constitute "adverse impact' under Cuyler unless the record demonstrates that a non-conflicted counsel would not have put on that defense or those witnesses. Miskinis, 966 F.2d at 1268-69.

In this case, the claim is not that Schick failed to present the defense that Vasquez was the actual killer; that was, in fact, Schick's primary defense theme. Rather, the claim is that Schick did not do enough to attack Bolanos' credibility by presenting him as fearful of Vasquez. But the record does not support this assertion.

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10. The Court has adopted a "fairly rigid rule of presumed prejudice for conflicts of interest." Strickland, 466 U.S. at 692, 104 S. Ct. 16 2067, because:

> . . . a rule requiring a defendant to show that a conflict of interests . . . prejudiced him in some specific fashion would not be susceptible of intelligent, even-handed application. In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. But in a case [involving a conflict of interest] the evil–it bears repeating–is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process.

Holloway v. Arkansas, 435 U.S. 475, 490, 98 S. Ct. 1173, 1181-82 (1978); see also Miskinis, 966 F.2d 1263, 1268 (9th Cir. 1992).

Defense counsel attempted to impeach Bolanos on every conceivable front. He asked questions designed to show that Bolanos was a friend and family member of Vasquez's family but was not frightened of Belmontes', and that Bolanos' true objective was to save his own hide. [11] It is unreasonable speculation that Bolanos would have been further impeached by evidence of Vasquez's criminal record or past. The court finds no "adverse effect," with Cuyler, on this ground.

Belmontes' claim also founders on the "actual conflict" requirement. Generally, it is more difficult to show an actual conflict resulting from successive rather than simultaneous representation. See Mannhalt v. Reed, 847 F.2d 576, 580 (9th Cir. 1988). See also United States v. Wheat, 813 F.2d 1399, 1402 & n.1 (9th Cir. 1987) ("in successive representation, conflicts of interest may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties so that he is incapable of diligently representing his client."). Although Schick remembered that he had once represented Vasquez, he did not recall "the specific charges or the disposition," and the record is devoid of evidence that Schick divided his loyalties such that he was incapable of diligently representing his client. The earlier representation was entirely unconnected to the McConnell murder. On this record, therefore, the court cannot conclude that Schick actively represented conflicting interests. Where the alleged conflict arises out of successive representation, and the prior representation was completely unrelated and petitioner has not shown that any privileged

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11. In response to the questions designed to show intimidation or bias, the prosecutor brought out on redirect that Bolanos already had testified against Vasquez in a separate prosecution of Vasquez for the McConnell murder. (See RT 1476:1-12.)

information as either divulged or withheld, or that counsel's loyalties were divided, "no actual conflict existed." Mannhalt, 847 F.2d at 580.

Finally, petitioner argues that the trial court's failure to adequately investigate when it received notice of the possible conflict requires automatic relief under Holloway v. Arkansas, 435 U.S. 475 (1978). But Holloway is not applicable here. In that case, the state court rejected appointed defense counsel's repeated assertions that the interests of his co-defendant clients were adverse. Here, the court made appropriate inquiry of Schick when made aware of the potential conflict arising out of the prior representation of Vasquez by another member of Schick's firm. While the Sixth Amendment requires a trial court to investigate known conflicts, Belmontes has offered no authority for the proposition that the trial court's knowledge of facts giving rise to one potential conflict triggers a duty to ensure that there are no other, unknown conflicts. "[T]rial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel. . . . Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." Cuyler, 446 U.S. at 347, 100 S. Ct. at 1717-18. The state court's inquiry was an adequate response to the evidence of an indirect, limited conflict that was then before it.

5. Claim A-5

Petitioner argues that he was deprived of due process when the prosecutor questioned him regarding his post-charging silence. In Doyle v. Ohio, 426 U.S. 610, 617-18, 96 S. Ct. 2240, 2244-45 (1976), the Supreme Court held that it is unconstitutional for a prosecutor to impeach a defendant with evidence of post-arrest silence. Although prior inconsistent statements may constitutionally be

used to impeach, silence may not.[12/] Petitioner takes issue with the following exchange during his cross examination:

> Q: Mr. Belmontes, from the time you talked to Deputy Holman and Deputy Cooper at the San Joaquin County Jail on March 22nd 1981, until today in this very courtroom you have never spoken to law enforcement concerning what happened on March 15, 1981?
> A: Have I spoken to officers?
> Q: About it. That's right.
> A: From the first day I got arrested?
> Q: No. From the jail statement on Sunday, when you were booked in the county jail and gave the third statement we have been calling the jail statement, until now you've never told law enforcement officers about it, anything else that happened there?
> A: No.
> [Defense counsel]: Judge, in fairness, I think the jury should be instructed once he's appointed an attorney, that conversation has to be directed through the attorney.
> [The court]: Yes. The question, ladies and gentlemen, is somewhat misdirected in the sense that Mr. Belmontes does not have to talk to anybody. As a matter of fact, he's admonished by his counsel, once lawyers have been appointed to represent him, not to talk to anybody. You should be aware of that fact. Without the presence of the lawyer.

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12. Where a prisoner waives his Miranda rights and speaks to officers, he may be impeached by statements he makes that are inconsistent with later testimony. But silence in reliance on Miranda warnings cannot be used to impeach. See Doyle v. Ohio, 426 U.S. 610 (1976); Phelps v. Duckworth, 772 F.2d 1410, 1412 (7th Cir. 1985).

Q: All right. So from then until now you haven't been on the record about what happened?
A: Not on the record. But a few times Officer Holman has taken me to court while we were in Lodi and we talked about it. But not on record.
Q: About the details of the offense?
A: Not really details. Just told him that I didn't do it. Told him that I was serious about when I said I hit the girl one time.

(RT 1973:1-1975:5.)

Unlike Doyle, this line of questioning was not an attempt to impeach Belmontes based on post-arrest silence – he was anything but silent – but was, rather, a clarification of how many statements Belmontes had made. In contrast with Doyle, the prosecutor here did not argue that Belmontes had fabricated the story he told at trial after the date of his third conversation with police, nor could he have done so; Belmontes' trial testimony was essentially consistent with the last version of events he related to police in the San Joaquin County jail. After the above exchange, the prosecutor made no reference to Belmontes' silence as tending to discredit his story. Even assuming, however, that the jury would have understood the exchange as Belmontes now suggests, as impeachment of Belmontes' credibility, it is clear that any Doyle error was harmless. In contrast with Doyle, the trial court here sustained Belmontes' objection to the prosecutor's question, and delivered a cautionary instruction at defense counsel's request.[13/] See Doyle, 426 U.S. at 614,

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13. Petitioner argues that the instruction compounded, rather than cured, the problem, in that it emphasized petitioner's exercise of his right to remain silent. Inadvertent emphasis is a widely recognized hazard of objection, however. It is apparent from the transcript that defense counsel received precisely the corrective instruction that he demanded. Thus, the alleged Doyle violation may be waived. To the

96 S. Ct. at 2243 (noting prosecutor's repeated references to defendant's silence, and trial court's overruling of objections); see also Phelps, 772 F.2d at 1413 (prejudice inquiry under Doyle depends, among other factors, on the use to which the prosecution puts the post-arrest silence; the quantum of other evidence indicative of guilt; the intensity and frequency of the reference; and the availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions). The only information developed was that petitioner spoke "off the record" to a deputy and made statements to the deputy that were consistent with his defense. In short, any error was clearly harmless beyond a reasonable doubt. See Phelps, 772 F.2d at 1413 ("Impermissible prosecutorial comment regarding post-arrest silence does not require reversal if the court determines it is harmless beyond a reasonable doubt.").

6. Claim A-6

Petitioner argues that the trial court improperly restricted the scope of cross examination of prosecution witness Carrie Rogers, who is Domingo Vasquez's wife. Petitioner's version of the events of March 15, 1981, was that he had struck McConnell only once, and that Domingo Vasquez must have struck the later, and fatal, blows. Carrie Rogers testified that she had heard petitioner state, on the evening after the murder, that he had struck the victim multiple times.

Belmontes' counsel cross examined Rogers as to her relationship with, and motive to protect, Vasquez, but

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extent that petitioner may wish to argue that his counsel was ineffective in failing to make the correct objection, see U.S. v. Chavez, 193 F.3d 375, 378-79 (5th Cir. 1999), the absence of prejudice would be no less fatal to petitioner's claim under Strickland, than under Doyle.

was not permitted to inquire into Rogers' understanding of how her testimony could affect Vasquez's chances of parole.[14] The trial court expressed concern that this line of questioning might distract the jury with collateral information about Vasquez's sentence, and so permitted cross examination about Rogers' motive to protect Vasquez's good name, but not about the more specific and tangible motive to facilitate his parole.

This restriction on cross examination was reasonable, and did not violate Belmontes' rights under the confrontation clause. "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, [or] confusion of the issues." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435 (1986). There was no evidence that Rogers believed that her testimony could affect Vasquez's parole date. In this circumstance, the court could conclude that opening up the topic of Vasquez's conviction and parole could lead to jury confusion and would not be probative. Moreover, even were the trial judge's ruling erroneous, it was plainly harmless. The record establishes that Rogers' loyalty to Vasquez was adequately demonstrated to the jury, in a number of ways. As the California Supreme Court summarized the record:

> Here the jury learned Rogers had been with Vasquez for eight years and had married him shortly after his arrest for McConnell's murder; that they had a daughter together; that she was seeing Vasquez on a weekly basis at the time of trial; that she had been

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14. At the time of Rogers' testimony, Vasquez had pled guilty to second degree murder in connection with McConnell's death and been sentenced to a term of fifteen years to life.

> living with Vasquez and supporting him on the date of the murder; that she knew Vasquez was keeping company with other women at that time and nonetheless "didn't do anything about it"; and that she did not come forward to report her information inculpating defendant as the killer until the eve of his trial. . . .
> . . .The prosecutor conceded in his opening argument: '[C]ounsel has suggested to you [Rogers] has a very definite interest in protecting a man, Domingo Vasquez, with whom she lives. Certainly, ladies and gentlemen of the jury, somebody that would marry someone who's been involved in something like this, when he's been cheating on her and she knows about it, that's loyalty. What else can you call it? And you have to take that into account in deciding whether to believe [Rogers]. Let's face it. That really calls into question her story.'

Belmontes, 248 Cal. Rptr. at 146 & n.10. The proposed cross examination would have been cumulative and would thus not have produced a "significantly different impression of [Rogers'] credibility" than that which was presented to the jury. Van Arsdall, 475 U.S. at 680, 106 S. Ct. at 1436.

7. Claim A-7

Belmontes argues that the trial court improperly admitted hearsay evidence that bolstered the testimony of Bobby Bolanos, identifying petitioner, rather than Vasquez, as the murderer, and that the court compounded this error with an erroneous jury instruction that precluded the jury from considering Bolanos' motive to shift blame to petitioner. The jury heard testimony, from several sources, that Bolanos had previously told a consistent story to others. Bolanos himself testified,

without objection, that he had previously told his girlfriend Teresa Cobarrubio that petitioner was the killer. Cobarrubio testified to the same effect, and police officer Coffey offered double hearsay, testifying that Cobarrubio had told him that Bolanos had told her that petitioner was the killer. The trial court admitted these last two statements as prior consistent statements, to rebut Belmontes' argument that Bolanos had fabricated his story to protect Vasquez. Petitioner argues that the trial court erred, because Bolanos' motive to protect Vasquez predated the prior statements.

"A state court's evidentiary ruling is grounds for federal habeas corpus relief only if it renders the state proceeding so fundamentally unfair as to violate due process" Bueno v. Hallahan, 998 F.2d 86, 87 (9th Cir. 1993). The state Supreme Court's holding that it was not error to admit the relevant testimony is conclusive as a matter of state law. Moreover, substantial evidence supported the jury's finding that Belmontes delivered the fatal blows, and the admission of this testimony did not render the trial fundamentally unfair.

Belmontes takes exception also to the trial court's use of California jury instruction 2.11.5, which instructs the jury not to discuss or give any consideration to why other individuals who may have been involved in the crime were not on trial along with the defendant. Petitioner argues that the jury may have understood this instruction to forbid consideration of Bolanos' plea agreement in assessing his credibility. The challenged instruction could hardly have been understood as Belmontes suggests, however, in light of the other jury instructions, which clearly required the jury to view Bolanos' testimony critically in light of his plea bargain. The court cannot say that the challenged instruction rendered the trial fundamentally unfair, as would be required to grant

habeas relief on this basis. See Foster v. Ward, 182 F.3d 1177, 1193 (10th Cir. 1999) (holding that instructional error is a ground for habeas relief only if it rendered the trial so fundamentally unfair as to cause a denial of due process).

8. Claim A-9

Petitioner argues that he was deprived of due process by the retroactivity regime applied to the California Supreme Court's decision in People v. Anderson, 43 Cal.3d 1104 (1987). Anderson overturned the earlier decision in Carlos v. Superior Court, 35 Cal.3d 131 (1983), which had held that the prosecution must prove intent to kill as an element of special circumstances liability. In cases following Anderson, the Supreme Court held that a defendant tried for felony murder with special circumstances between the decisions in Carlos and Anderson was entitled to an instruction and finding on intent to kill, but that defendants tried prior to Carlos were not. Petitioner, who was tried prior to Carlos, argues that this retroactivity regime violates due process. The Ninth Circuit, however, has repeatedly held that the retroactive application of the decision in Anderson does not violate due process. See, e.g., Hamilton v. Vasquez, 17 F.3d 1149, 1164 (9th Cir. 1994); Hendricks v. Vasquez, 974 F.2d 1099, 1107 (9th Cir. 1992). Moreover, even if a finding of specific intent were required, the jury here made one. See People v. Belmontes, 248 Cal. Rptr. at 154 n.18.

9. Claim A-13

Petitioner argues that two jury instructions given by the trial court, CALJIC 6.10.5 and 6.11, are defective in that they permit a finding of guilt without proof beyond a reasonable doubt. Specifically, if the jury rejected the

premeditated murder and felony murder theories, it could nonetheless have found petitioner guilty of murder on a vicarious liability theory – on the belief that Vasquez committed the murder and that petitioner was liable as his coconspirator. Because the challenged instructions permit the jury to find the existence of an uncharged conspiracy and the defendant's membership in that conspiracy by a preponderance of the evidence, Belmontes argues, he could conceivably have been adjudged guilty of murder without every element having been proved beyond a reasonable doubt.

This argument is frivolous. That the jury did not rely on a conspiracy theory in convicting Belmontes is evidence from its special findings that Belmontes was guilty of intentional and premeditated murder.[15/]

10. Claim A-14

Petitioner argues that the trial court improperly refused to give requested instructions on lesser-related offenses that encapsulated petitioner's theory of the case. There is no federal due process right to instruction on lesser-related offenses.[16/] See Hopkins v. Reeves, 524 U.S. 88, 97, 118 s. Ct. 1985, 1901 (1998) (declining to extend rule of Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382

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15. The jury found that petitioner personally and intentionally committed the killing, and that he was the actual killer, and rejected the only vicarious liability special finding that it was given – the allegation that Belmontes had intentionally aided, abetted or assisted in the killing.

16. Petitioner argues that there is a federal constitutional requirement that a court instruct the jury on a defendant's "theory of the case." (See 1995 Mem. in Supp. at 25-26.) The cases cited for this proposition, however, all pertain to instructions concerning a theory offered in defense, such as entrapment or alibi, not to instruction on lesser-related offenses.

(1979) from lesser-included offenses to lesser-related offenses). Although California formerly recognized a right to such an instruction, see People v. Birks, 77 Cal. Rptr. 2d 848 (1998). Even if instructions on lesser-related offenses were constitutionally required, the trial court's error in refusing them would be harmless, since, as the California Supreme Court noted, the record does not "support the possibility that the jury would have convicted defendant of the lesser-related offenses under the refused instructions." 248 Cal.Rptr. at 153.

As to the denial of petitioner's request for aiding and abetting instructions, their omission could not have prejudiced petitioner, because it is evident from the special findings that the jury found petitioner directly, and not vicariously, liable.

B. Penalty Phase

1. Claim B-1

Belmontes argues that he was deprived of due process and the effective assistance of counsel by trial counsel's failure to conduct a reasonably adequate mental state investigation, and by counsel's failure to present mental state evidence in mitigation in the penalty phase.

Belmontes' trial counsel, Mr. Schick, retained a psychiatrist, Dr. Cavanaugh, to evaluate petitioner as to issues relevant at the guilt phase, namely insanity, diminished capacity, and competency, but did not ask him to conduct any analysis of factors relevant to the penalty phase. (See Stmt. of Facts in Supp. of Mot. for Evid. Hearing Regarding Claim B-1 at 11:10-12:13.) Schick has acknowledged that his failure to seek expert opinion regarding mental state mitigation evidence was not a tactical decision, but that he "didn't really consider the

use of a psychiatrist." (Id. at 12:19-13:4.) Belmontes argues that this failure on counsel's part deprived him of the effective assistance of counsel.

To establish that counsel's failure to consider the use of a psychiatrist for the penalty phase deprived him of counsel in violation of the sixth amendment, Belmontes must satisfy the two-part test of Strickland v. Washington, 466 U.S. 668 (1984), which requires a showing both that counsel's performance was unreasonable in light of prevailing professional norms, see id. at 687-88, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 695; see also Jackson v. Calderon, 211 F.3d 1148, 1154 (9th Cir. May 8, 2000). Strickland requires significant deference to trial counsel's strategic decisions, however. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91, 104 S. Ct. at 2066.

The record here shows that trial counsel pursued no investigation whatsoever into Belmontes' mental state for the penalty phase. Schick acknowledged that after consulting with Dr. Cavanaugh on competency, insanity and diminished capacity, he had no further contact with Dr. Cavanaugh, or with any other psychiatrist in relation to the penalty phase. (See Schick Depo. at 665:6-23, 667:9-24.) Under Strickland, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of

deference to counsel's judgments." Strickland, 466 U.S. at 690-91, 104 S. Ct. 16 2066. Even with such deference, however, it is clear on this record that counsel's decision not to pursue mental state mitigation evidence for the penalty phase was not a tactical one. (See, e.g., Schick Depo. at 665:6-23 ("I didn't really consider the use of a psychiatrist."). Counsel's failure to investigate mental state evidence for presentation at the penalty phase, even where such evidence is unhelpful at the guilt phase, is not reasonable under Ninth Circuit precedent. See Jackson, 216 F.3d at 1162-63 (citing Hendricks v. Calderon, 70 F.3d 1032, 1043 (9th Cir. 1995)).

Belmontes is deemed to have suffered prejudice as the result of Schick's deficient performance only if he shows that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Wade v. Calderon, 29 F.3d 1312, 1323 (9th Cir. 1994). Thus, in order to determine whether Schick's failure to present certain evidence in mitigation might have affected the jury's decision, "it is essential to compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently." Bonin v. Calderon, 59 F.3d 815, 833-834 (9th Cir. 1995).

For the expert psychiatric testimony that could have been presented, Belmontes relies primarily on the testimony of Dr. James Missett, a forensic psychiatrist who examined Belmontes and researched his family history.[17] Dr. Missett identified thirteen "themes" that he believed might have been pursued as mitigation in the

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17. Belmontes offers testimony of other psychiatric experts as to several of the themes identified by Missett, but concedes that the themes described by Missett encapsulate his theory. (See Petr.'s Mem. on Merits of Claims A-1 through A-4 and B-1 at 62.)

penalty phase:

1. Alcoholism and domestic violence by Fernando Belmontes Sr. against Belmontes' mother Carole;
2. Demeaning and discriminatory treatment of Fernando Belmontes, Sr. by the Salvaggio family from the outset of marriage and throughout petitioner's youth;
3. Circumstances of objective and comparative poverty during early childhood;
4. Positive youth achievements in Little League, Cadets, paper route, absence of any indicia of conduct disorder;
5. Onset of rheumatic fever at approximately age 10 and curtailment of activities; objective adversity accompanying repeated eruptions;
6. Subjective adversity, fears of premature death;
7. Depression as a consequence during teen home schooling years;
8. Anti-Hispanic racial attitudes in high school;
9. Break up of family, loss of home in 1977;
10. Teenage criminality and youth gang support;
11. Factors operative at the time of the offense, militating against premeditation - drugs, alcohol, organic brain dysfunction, Domingo Vasquez's position as instigator of the burglary;
12. Positive institutional adjustment - leader of group in YA fire camp, safety contributions to fire crew
13. Lack of future violence potential in prison - avoidance of violence at substantial personal cost.

(Petr.'s Mem on Merits of Claims A-1 through A-4 and B-1 at 64.)

Schick used nine witnesses to develop two principal themes on Belmontes' behalf in the penalty phase, the

first related to Belmontes' sympathetic life history, and the second involving his potential for institutional adjustment if sentenced to prison. In the course of developing these themes, Schick introduced testimony as to most of the factual matters identified by Missett. As discussed in Part I.B.2, supra, as to family history, Belmontes' mother and maternal grandfather, and Belmontes himself testified in some detail to Belmontes' father's history of alcoholism and domestic violence to the relationship between the Salvaggios and the Belmontes family, to the family's poverty and Mrs. Belmontes' two divorces and their effects on Belmontes. In addition, they testified to some of petitioner's positive achievements in youth.[18] It is unclear that testimony on Missett's tenth "theme" – petitioner's adolescent involvement with gang, would have been viewed by the jury as a mitigating factor rather than an aggravating factor.[19]

As to Petitioner's potential for institutional adjustment and history of nonviolent behavior while institutionalized, Schick introduced substantial evidence of this "theme" as well. As discussed in Part I.B.2, supra, the Reverend Dale Barrett, who supervised the M-2 program, Don Miller,

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18. Petitioner identifies certain positive achievements that he argues should have been presented to the jury, such as the fact that Belmontes held a paper route, played Little League baseball, and dealt with racism at his high school. Introduction of these facts would nto have created a reasonable likelihood of a different result.

19. Missett's fifth and sixth themes pertain to the occurrence, and socially isolating effects, of Belmontes' childhood bout with rheumatic fever. While this evidence might have aroused some sympathy for Belmontes, the court does not find it reasonably likely that it would have produced a different result. The evidence of rheumatic fever does not present a substantially "different picture of [Belmontes] than any the jury was allowed to consider." Jackson, 211 F.3d at 1163.

Barrett's assistant pastor, and the Haros, Belmontes' M-2 sponsor family, all testified that Belmontes benefitted from a structured environment and that he had participated actively and sincerely in the program. In addition, Barrett testified that Belmontes was "salvageable," and Miller testified that he expected Belmontes to be very helpful, if imprisoned, in counseling other inmates to avoid his mistakes.

Petitioner argues that, although the jury heard testimony on each of Missett's themes, expert testimony would have helped them to weigh it appropriately. But petitioner provides no reason to believe that the jury needed professional help, beyond defense counsel's argument, to understand evidence of petitioner's difficult childhood or prospects for institutional adjustment. Given that the pertinent facts were largely before the jury, the court is not persuaded that, had the jury heard the expert testimony identified by petitioner, "there is a reasonable probability that . . . the result of the proceeding would have been different." Wade v. Calderon, 29 F.3d 1312, 1323 (9th Cir. 1994).

Only Missett's eleventh "theme" merits further discussion. Where evidence of a defendant's mental state at the time of the crime tends to undermine a finding of premeditation, counsel's failure to investigate and present expert testimony regarding such evidence is particularly likely to be deemed Strickland error. See Jackson v. Calderon, 211 F.3d at 1163-64. A finding of error is particularly likely where, as here, the aggravating evidence presented to the jury is "far from overwhelming." See id. at 1164. There was evidence that petitioner had been consuming alcohol and amphetamines for four days prior to the murder, and had not slept during that time. Dr. Missett indicates that he would have testified "to a reasonable medical certainty" that

under the circumstances, petitioner's ability to deliberate would have been substantially impaired. (See Petr.'s Stmt. of Facts in Suppl. of Claim B-1, docket no. 286, at 62:16-24.) Testimony of this sort, however, would have opened the door to introduction of the evidence discussed above regarding Belmontes' alleged execution-style murder of Jerry Harmon. Had petitioner argued that he would not have murdered Steacy McConnell but for his drug intoxication, evidence of Belmontes' prior premeditated murderous acts would have been admissible to rebut the inference that Belmontes' murder of McConnell was the result of unique circumstances and that he was ordinarily incapable of the deliberate taking of another life. (Cf. RT 2331:26-2335:12.) Thus, while the aggravating evidence actually presented to the jury did not make this a clear-cut case for application of the death penalty, had Schick presented the evidence now offered by petitioner, the prosecutor would most likely have been permitted to rebut the evidence with damning evidence of prior violent acts. Competent counsel would not have done anything to jeopardize the successful exclusion of the Herman execution style killing, which would have been the most powerful imaginable aggravating evidence. Thus, the court finds no reasonable probability that, but for counsel's error, the result of the proceeding would have been different.

2. Claim B-2

Petitioner argues that he was deprived of due process by the trial court's exclusion, from the penalty phase of the trial, of evidence of the sentence imposed on Domingo Vasquez. Although the Supreme Court has held that the constitution requires some proportionality between the gravity of a defendant's crime and the sentence imposed, see, e.g., Payne v. Tennessee, 501 U.S. 808, 861, 111 S. Ct. 2597, 2628 (1991) ("proportionality requires a nexus

between the punishment imposed and the defendant's blameworthiness"), it has not held that evidence of codefendants' sentences is constitutionally relevant evidence in mitigation. Belmontes provides no binding or persuasive authority for the novel proposition that a criminal defendant has a constitutional right to introduce evidence of the disposition of charges against codefendants.[20/] Accordingly, the trial court's exclusion of that evidence as potentially confusing to the jury did not violate Belmontes' due process rights.

3. Claim B-3

Belmontes argues that the trial court erred in its response to a juror's question about the jury's role in considering aggravating and mitigating factors, in violation of his constitutional right to have the jury consider all mitigating factors. See, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987).

Petitioner's claim is based on the following exchange between juror Hern and the trial court, which occurred after several hours of deliberation:

> Juror Hern: The statement about the aggravation and the mitigation of the circumstances, now, that was the listing?
> The Court: That was the listing, yes, ma'am.
> Juror Hern: Of those certain factors we were to decide one or the other and then balance the sheet?
> The Court: That is right. It is a balancing question.

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20. Belmontes relies primarily on a Florida Supreme Court case that held that Florida's death penalty statute requires admission of such evidence. See Messer v. Florida, 330 So. 2d 137, 141-42 (1976).

(RT 2501:27-2502:06.)

Petitioner argues that juror Hern's comments reveal her misunderstanding of the constitutional obligation to consider non-enumerated mitigating factors, and that the trial court committed reversible error by reinforcing her impression. Hern, according to petitioner, saw the jury's role as considering the statutory list of aggravating and mitigating factors and tallying which were more numerous in petitioner's case. To prevail on this claim, Belmontes need not show that the jury more likely than not misunderstood its role. Rather, petitioner must show only "that there is a reasonable likelihood" that the jury misapplied the instruction in a way that prohibited consideration of constitutionally relevant evidence. See Boyde v. California, 494 U.S. 370, 370, 110 S. Ct. 1190, 1198.

A single instruction should not be read in isolation, but must be read in the context of the instructions as a whole and the entire record. Boyde, 494 U.S. at 383-84, 110 S. Ct. at 1199-2000. The court concurs with the Supreme Court of California that "the instructions and arguments taken as a whole fully and properly define the scope and nature of the jury's sentencing responsibilities." Belmontes, 45 Cal.3d at 804-05, 248 Cal. Rptr. at 161. The jury was explicitly told that it could consider any mitigating factor and that a single mitigating circumstance on its own could support a non-death verdict. Moreover, neither the court's comments nor the juror's, in this brief exchange, suggests a misunderstanding or repudiation of these instructions.

4. Claim B-4

Petitioner argues that California's death penalty statute is unconstitutional as applied, in that it fails to

provide the "guided discretion" required by Gregg v. Georgia, 428 U.S. 153 (1976). Specifically, petitioner argues that California's statute is unique among all death penalty statutes in that it fails to guide the jury's discretion as to which factors are to be considered mitigating factors and which are to be considered aggravating. Belmontes provides no authority for the proposition that the constitution requires that each factor be statutorily identified as either mitigating or aggravating. In Tuilaepa v. California, 512 U.S. 967, 114 S. Ct. 2630 (1994), the Supreme Court rejected the argument that "the § 190.3 sentencing factors are flawed because they do not instruct the sentencer how to weigh any of the facts it finds in deciding upon the ultimate sentence." Id. at 978-79, 114 S. Ct. at 2638. Belmontes argues, however, that although Tuilaepa upheld the statute against a facial challenge, it does not foreclose an "as applied" challenge based on the prosecutor's suggestion here that Belmontes' youth was an aggravating, rather than a mitigating factor. Tuilaepa, however, forecloses precisely this argument:

> petitioners claim that a single list of factors is unconstitutional because it does not guide the jury in evaluating and weighing the evidence and allows the prosecution (as well as the defense) to make wide-ranging arguments about whether the defendant deserves the death penalty. This argument, too, is foreclosed by our cases.

Tuilaepa, 512 U.S. at 979, 114 S. Ct. at 2638. Moreover, as the California Supreme Court noted in rejecting this claim before Tuilaepa was decided, Belmontes waived this argument by failure to object at trial. See Belmontes, 45 Cal.3d at 806, 248 Cal. Rptr. at 162.

5. Claim B-5

Petitioner argues that he was deprived of due process and subjected to cruel and unusual punishment by the admission of evidence of unadjudicated prior misconduct. The instances of prior misconduct introduced at Belmontes' penalty trial included (i) a 1979 altercation in a juvenile facility; (ii) a 1981 domestic dispute with petitioner's girlfriend; (iii) a 1979 incident in which petitioner allegedly stole a stolen gun from the original thief by pointing the loaded weapon at the man; (iv) a 1979 incident where petitioner indicated that he was armed and confident in his ability to protect himself; and (v) a prior no contest plea to accessory to manslaughter. Petitioner asserts that "these matters were erroneously admitted and constituted an unreliable basis for the penalty determination under federal constitutional standards."

This argument is meritless. There is no constitutional bar to the consideration, at the penalty phase, of unadjudicated prior instances of criminal misconduct. See McDowell v. Calderon, 107 F.3d 1351, 1366 (9th Cir. 1997), vacated in part on other grounds, 130 F.3d 833 (9th Cir. 1997) (en banc), ("The introduction of [unadjudicated criminal conduct] during the penalty phase of a capital case does not necessarily violate a defendant's rights under the Eighth or Fourteenth Amendments or render a death sentence unreliable."); see also United States v. Cooper, 91 F. Supp.2d 90, 107 (D.D.C. 2000) (citing cases).

The only incident the admission of which arguably constituted error was the 1979 conversation in which Belmontes indicated that he was not worried about himself because he was armed. As this was not a threat directed at any individual, it was not a criminal act under the California death penalty statute. The court agrees with the California Supreme Court, however, that in light

of the other aggravating circumstances, most notably the brutality of the crime itself, there is no likelihood that the admission of testimony regarding that incident prejudiced Belmontes. See Belmontes, 45 Cal.3d at 809, 248 Cal. Rptr. at 164.

6. Claim B-7

Petitioner argues that he was deprived of due process and subjected to cruel and unusual punishment by "the trial court's refusal to adequately respond to the jury's question about the consequences of their failure to agree on a penalty." (1995 Mem. in Supp. at 43.) During penalty deliberations, the jury foreman sent the judge a note inquiring about the consequences of a deadlock as to penalty, and specifically, whether a majority vote could suffice to decide on life imprisonment. The court reinstructed the jury regarding the requirement of a unanimous verdict, and indicated that he could not answer the question as to what would happen if they could not agree. (See 1995 Mem. in Supp. at 43 & Exh. D.) Petitioner argues that the constitution requires that jurors be informed as to what will happen in the event of deadlock, and that the jury may have imposed the death penalty out of fear that deadlock would result in petitioner's retrial or eventual parole.

In Jones v. United States, the Supreme Court held that "the Eighth Amendment does not require that the jury be instructed as to the consequences of their failure to agree." Jones v. United States, 527 U.S. 373, 381, 119 S. Ct. 2090, 2098 (1999). Although the holding in Jones concerned the giving of such an instruction in every case as part of the standard instructions, the reasoning in Jones is equally applicable to the situation as here, where the jury makes inquiry.

7. Claim B-8

After the jury returned the death verdict, state law required the judge to consider an automatic motion for modification of the judgment. See Penal Code § 190.4(e). Petitioner argues that he was deprived of due process by "the trial court's pronounced prejudgment" of that motion. The trial court sent a letter to jurors several days after they rendered their verdict and several weeks before the hearing on the 190.4(e) motion, thanking them for their service, and promising that their death judgment "is acceptable and shall be followed." Petitioner observes that this letter is evidence that the trial court had prejudged the 190.4(e) motion, in violation of the court's statutory responsibility to make an independent review of the evidence and render an independent opinion as to the appropriateness of the death penalty. (See 1995 Mem. in Supp. at 49-50.)

The California Supreme Court pronounced the offending remark "patently improper," but found that "defendant has not established that the trial judge ultimately failed to make the independent determination respecting the appropriateness of the penalty verdict, as he was obliged to do under section 190.4, subdivision (e)." Belmontes, 45 Cal.3d at 816, 248 Cal. Rptr. at 169.[21] The Court's finding was informed by consideration of the remark in the context of the letter in which it was made and in light of the trial court's explanation, which it found "credible" that it "was made for therapeutic purpose more than a legal purpose." Id. The Court remarked that "the [trial] court's thorough and detailed findings entered

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21. In these circumstances, state law places the burden on Belmontes to rebut a presumption that an official duty such as the judge's duty to render an impartial ruling on the appropriateness of the death penalty has been satisfied. See Cal. Evid. Code § 664.

in the record reinforce our conclusion." Id. Assuming that the alleged failure to adhere to a state law requirement would violate Belmontes' federal constitutional rights, the California Supreme Court's conclusion that the trial court did render the required impartial judgment is entitled to deference as a factual finding.

III.

Petitioner's motion for summary judgment is DENIED. Respondent's motion for summary judgment is GRANTED. There appear to be remaining claims that were not the subject of these motions – claims A-8, A-10 through A-12, B-6, and B-9. Counsel shall submit a joint status statement within 14 days advising the court of the status of these claims and proposing a future schedule for the timely resolution of all remaining issues.

IT IS SO ORDERED.

Dated: _____.

_____

DAVID F. LEVI
United States District Judge

THE PEOPLE,
Plaintiff and Respondent,

v.

FERNANDO BELMONTES,
Defendant and Appellant.

No. S004467, Crim. No. 22810
Supreme Court of California
Jun. 23, 1988.

SUMMARY

Defendant was convicted of first degree murder and burglary in the second degree. The jury returned special findings he personally committed the killing, and the murder was intentional, willful, deliberate, premeditated, and the result of the commission or attempted commission of the burglary. A special circumstance allegation under the 1978 death penalty law was found true: that the murder was committed while defendant was engaged in the commission or attempted commission of a burglary. The jury made additional special findings that defendant was the actual killer and had acted with specific intent to kill. The jury fixed the penalty at death; the trial court denied defendant's automatic motion to modify the verdict. The victim had been found beaten unconscious on the floor of her residence. She had died a short while later from cerebral hemorrhaging due to 15 to 20 gaping wounds to her head which cracked her skull. Defendant furnished three statements to investigators shortly after his arrest. In the second statement, he admitted involvement, claiming the incident was planned as a burglary with two accomplices; he admitted hitting the victim only once, knocking her to the floor. One accomplice pled guilty to burglary, received immunity from prosecution for the murder and testified for the People. (Superior Court of San Joaquin County, No.

32183, William R. Giffen, Judge.)

The Supreme Court affirmed. As to the guilt phase of trial, it held the trial court properly admitted defendant's pretrial statements, since no improper threats or promises of leniency were made to him by police investigators. Also, the trial court properly admitted evidence of a prior consistent statement of the girlfriend of the testifying accomplice, confirming that such accomplice told her that defendant had killed the victim. It also held the trial court was within its discretion in limiting cross-examination of the girlfriend, as to the disposition of the testifying accomplice's case. It further held the People were entitled to proceed on an alternative uncharged conspiracy theory of liability. It also held the jury properly made special findings in connection with the verdict of guilt of first degree murder, and with regard to the special circumstances found to be true. It further held the special circumstance finding of premeditation and deliberation was supported by the evidence.

As to the penalty phase, the court held the jury was adequately informed of the full nature of its responsibility to consider sympathy, and defendant's general character and background evidence. It also held the jury was adequately informed of the full nature of its sentencing responsibility, even though an instruction charged that it "shall" impose death if it found that aggravating circumstances outweighed mitigating circumstances. It further held the jury did not improperly consider the age of defendant at the time of the murder or his lack of remorse as aggravating factors. Although a juror had talked to a member of the victim's family during a break in the penalty phase and an alternate juror had talked to another family member, it held the presumption of prejudice was rebutted and no prejudice actually resulted. It also held the trial court did not err in excluding

evidence of the pleas and negotiated dispositions of defendant's two accomplices. It held the trial court erred in sending a letter to the jurors, after they were discharged, indicating their decision was acceptable and would be followed, since the judge had not yet heard defendant's automatic motion for modification of the jury's death verdict; however, defendant did not establish that the judge failed to make the independent determination as to the appropriateness of the penalty verdict. (Opinion by Eagleson, J., expressing the unanimous view of the court.)

COUNSEL

Eric S. Multhaup, under appointment by the Supreme Court, Jean R. Sternberg and Kathy M. Chavez for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Edmund D. McMurray, Robert D. Marshall, Jane N.[page 760] Kirkland, Michael T. Garcia and Jane L. Lamborn, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

EAGLESON, J.—

Defendant Fernando Belmontes was convicted of the first degree murder of Steacy McConnell (Pen. Code, § 187)[1] and burglary in the second degree. (§§ 459-460.) The jury returned special findings that he personally committed the killing, and that the murder was intentional, wilful, deliberate, premeditated, and the

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1. All statutory references are to the Penal Code unless otherwise indicated.

result of the commission or attempted commission of the burglary. A special circumstance allegation under the 1978 death penalty law was found true: that the murder was committed while defendant was engaged in the commission or attempted commission of a burglary. (§ 190.2, subd. (a)(17)(vii).) The jury made additional special findings that defendant was the actual killer and had acted with specific intent to kill. The jury fixed the penalty at death; this appeal is automatic. (Cal. Const., art. VI, § 11; § 1239, subd. (b).)

For the reasons set forth hereafter, we affirm the judgment in its entirety.

I. GUILT PHASE

A. FACTS

Prosecution Case

On Sunday, March 15, 1981, the parents of 19-year-old Steacy McConnell found her beaten unconscious on the floor of her residence in Victor, several feet from the unlocked front door. She had telephoned them that same morning to advise that several people, including Domingo Vasquez, had been threatening her.

McConnell died a short while later from cerebral hemorrhaging due to 15 to 20 gaping wounds to her head which cracked her skull. The pathologist testified there would have been sounds "like a cracked pot" associated with the blows which fractured the skull, and blood would have splattered in a manner consistent with the blood patterns found on the door jambs next to where she was found. A single contusion on McConnell's right temple was caused by blunt trauma of lesser force and did not lacerate the skin. It alone would not have caused death

and — if it had been the first blow — would not likely have caused unconsciousness. Numerous defensive bruises and contusions on her arms, hands, legs and feet evidenced a struggle. All wounds were consistent with having been made by the metal dumbbell bar in evidence at trial. McConnell's stereo components were missing. The lock on the rear bedroom door was broken in. The master bedroom was ransacked; traces of blood were found splattered on the walls, door jambs and a chest of drawers in that room.

Defendant was spending the weekend with Bobby Bolanos in Lodi.[2/] Both knew Domingo Vasquez, who was acquainted with McConnell. During the week preceding the murder, Vasquez, Bolanos and others had "partied" at McConnell's house. Vasquez "ripped off" a quantity of amphetamine pills from her; the party ended with McConnell throwing Vasquez and his friends out of her house two days prior to the murder. The group subsequently discussed their general dislike of McConnell.

Bolanos, who pled guilty to burglary and received immunity from prosecution for the murder, testified for the People. On Sunday morning, he and defendant drove to Vasquez's residence in Bolanos's vintage black Chevy. Vasquez, who was talking on the telephone with McConnell when they arrived, shortly hung up and informed them that McConnell's parents were picking her up and she would not be home that day. Defendant was short of funds, having unsuccessfully tried to pawn a ring the previous week. Bolanos, a seasonal farmworker, was out of work. Vasquez was unemployed. The three men agreed to burglarize McConnell's residence, steal her

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2. On the date of the crime, defendant was on parole from the California Youth Authority and living in a halfway house in Stockton. The jury was not told of this fact at the guilt phase.

stereo and "clean house." Defendant was wearing a baseball cap with its bill flipped up, Vasquez wore a stocking cap or beanie, Bolanos wore a checkered Pendleton shirt-jacket. Vasquez's girlfriend, Carrie Lynn Rogers, was present; she testified that as the men departed defendant picked up a steel dumbbell bar which he carried out with him.

Bolanos was the "wheel man" and never entered McConnell's residence; a role confirmed by defendant. En route to Victor, defendant suggested that he alone would approach the house on foot, using the metal bar if needed to force entry. Bolanos pulled over a short distance from the house; defendant left his wristwatch behind, concealed the bar under his jacket and walked to the residence. In accord with the plan, Bolanos and Vasquez waited several minutes, then drove up and backed into McConnell's driveway. Vasquez could not find the key to the trunk. As Bolanos got out of the vehicle to assist Vasquez, he heard repeated knocking or banging noises coming from within the house. They thought defendant was having trouble with the stereo. Vasquez entered to assist him. Bolanos remained in the car, still hearing the rhythmic thumping sounds as Vasquez walked up to the front door.

Shortly, defendant and Vasquez emerged from the house carrying stereo components. Defendant alone was covered with blood sprinkled on his face, pants and shoes. Vasquez "looked like he had seen a ghost." Defendant informed Bolanos he had to "take out a witness" because she was home. He explained that McConnell heard Vasquez and Bolanos drive up, and that he hit her with the bar when she looked away from him, and continued to hit her approximately 15 more times.

Lucy Flores, McConnell's neighbor, observed a black

Chevy with distinctive, wide taillights back into McConnell's driveway on the morning of her murder. A dark-complected man wearing a stocking cap got out of the passenger side and tried to unlock the trunk. He appeared to have difficulty with the lock, whereupon the driver, a male of Mexican or Italian ancestry, wearing a brown checkered shirt-jacket, got out of the car and unlocked the trunk. The driver got back in; the passenger walked towards the front of McConnell's house and met a third man. Flores did not see where the third man had come from. A short while later, she observed the two men hurriedly exiting from the back door of McConnell's house. The man in the stocking cap was carrying stereo speakers, the third man followed close behind carrying a stereo amplifier. They put the items in the trunk, got in the car and drove off.

Bolanos testified that en route to the nearby city of Galt to fence the stereo, defendant, who was wearing gloves, wiped blood off of the metal bar and his shoes. Defendant threw the bar out of the car window as they crossed a bridge over the Mokelumne river (Bolanos later led police to the location on the river bank from which the bar was recovered). The group went to the home of Manuel Vasquez, Domingo's brother, where defendant changed into a pair of clean pants. One Raul Barron was contacted; he met the three men at the home of Irma Vasquez, Domingo's sister, and purchased McConnell's stereo components for $100. The stereo components were recovered and introduced into evidence; Barron testified he paid $100 for them to the man wearing the baseball cap who did most of the talking.

Later that afternoon Bolanos gave his girlfriend, Teresa Cobarrubio, $15 from his share of the proceeds from the sale of the stereo. Acting scared, he informed her that he, defendant and Vasquez had burglarized McConnell's

residence. The following day Bolanos and Cobarrubio read a newspaper account of McConnell's murder. Cobarrubio testified that at that point Bolanos related further details of the crime, informing her that he had remained in his car outside of McConnell's house, and that defendant had exited from the house with blood all over his clothes, stating he had to "take a witness out."

On Monday, March 16, Vasquez called Bolanos in a panic to advise he had been questioned by police and did not want to "take the rap" for defendant. Bolanos and defendant went to Vasquez's house where the three sat in the living room discussing the murder. Carrie Lynn Rogers, Vasquez's girlfriend (who subsequently married him in jail — and who was a distant cousin to Bolanos) testified that from the kitchen she overheard the men discussing their sortie to McConnell's house, and heard defendant describe how he had first entered alone and hit McConnell several times with the bar, after which Vasquez had joined him in the house.

After the meeting, defendant telephoned his girlfriend, Barbara Murillo. Murillo testified that during the conversation defendant informed her he was "in trouble," relating that he had gotten into an argument with McConnell at her house, become angered and hit her, and that she fell and "went to sleep," although he "didn't mean for her to go to sleep."

Belmontes fled to Southern California where he was arrested by Ontario police six days after the murder. Blood found on the tongue of one of his shoes was tested and found to be "type O" — McConnell's blood type.

Defendant furnished three tape-recorded statements to investigators shortly after his arrest. In the first statement he denied any complicity in the crime, but

inquired whether Bolanos or Vasquez had been taken into custody. In his second statement he admitted involvement; claiming the incident was planned as a "stupid little burglary." He had approached McConnell's house alone on foot; when she answered the door he entered and they just talked. He was not carrying the metal bar. When Bolanos drove up, defendant thought they would all talk a bit and leave. Instead, Vasquez came to the door and hit McConnell "two or three" times. They grabbed the stereo and ran.

In his third statement, defendant admitted he was armed with the dumbbell bar when he entered McConnell's house. After speaking with her for a few minutes, Vasquez arrived and pushed the front door open. McConnell immediately recognized Vasquez, who ordered defendant to "hit her." Defendant complied, hitting McConnell once in the head with the bar, knocking her to the floor. He proceeded to break down the rear bedroom door, search the closet, and remove the stereo components from the front of the house to Bolanos's car. He was not paying attention to Vasquez's actions during this period, and did not observe how the victim came to have suffered 15 to 20 fatal blows to her head.

Defense Case

The prosecution proceeded on actual malice-deliberation, vicarious liability (conspiracy) and felony-murder theories. Belmontes's defense was that he abandoned all intent to go through with the burglary once he knocked on the door and discovered McConnell at home. He only entered the house to "play it out." Although he struck McConnell the one blow with the bar, it was only at Vasquez's direction; he did not intend to kill her. Vasquez must have dealt the additional fatal blows to McConnell while defendant was breaking into and

searching the back rooms of the house.

Defendant testified in his own behalf. On Sunday morning, March 15, he and Bolanos went to Vasquez's house. Defendant had $7 remaining from his last paycheck and would not be paid again until April. Vasquez suggested they steal McConnell's stereo because she was a "snitch." Defendant had been to McConnell's house twice in the previous month. She was not a friend, however, and it meant nothing to him to "rip her off." He testified: "It was just something that came up. Everybody agreed on it, it happened. You can't tell what's going to happen from one day to the next."

They drove to Victor and parked a half block away from McConnell's house. The plan was for defendant to go to the door first, since McConnell would not let Vasquez or Bolanos inside but was unaware defendant knew them. Defendant, however, did not anticipate that McConnell would be home. Vasquez gave him the dumbbell bar to use to break a window. Defendant concealed it up his sleeve. Vasquez and Bolanos stayed in the car; defendant walked to McConnell's front door, knocked, and she answered. He told her he was hitchhiking and was stopping by because it was raining. McConnell invited him in. She noticed a bulge in his sleeve and asked what it was. Defendant showed her the bar, explaining he had it because he was hitchhiking; thereafter displaying it openly. He used McConnell's bathroom and then stood by the table and talked while she ironed clothes. She related that she was having problems with some people and asked him if he knew Domingo Vasquez. Defendant said he had met Domingo before.

Five minutes after defendant entered the house, Bolanos and Vasquez pulled into the driveway. McConnell started walking toward the front door. Defendant

followed behind her and was placing the bar back up his sleeve when Vasquez rapped loudly on the door. According to defendant, the sequence of events was such that after pulling up Vasquez must have come directly to the front door; he would not have had time to go to the trunk of Bolanos's car.

Vasquez pushed the door open, saw McConnell and ordered defendant to "hit her." Defendant followed Vasquez's directive and hit McConnell in the side of the head with the bar, using as much force as he could with a backhanded sweeping motion. She fell to the floor. Defendant dropped the bar, ran to the back bedroom, broke down the door, searched that room and the kitchen, and returned to the living room, all within a matter of several seconds. He did not enter or ransack the master bedroom, testifying it must have been Vasquez. Upon returning to the front of the house, defendant observed Vasquez standing in the same spot holding the metal bar. He had not seen Vasquez hit McConnell nor heard any blows landing, because he was not paying attention. He could not explain the presence of defensive bruises and contusions on McConnell's hands and feet.

Defendant testified he was "mad" and "disgusted" because Vasquez was just "standing there like a fool" not doing anything while he was running around the house "looking for something to take." Defendant told Vasquez to grab something; Vasquez picked up a speaker. Defendant ripped out the stereo wires and antenna, put the second speaker on top of the stereo unit, and told Vasquez to run. Vasquez ran out the back door; defendant followed close behind.

They loaded the stereo components into the trunk. Vasquez got in the back seat, defendant rode "shotgun side," and Bolanos drove. En route to Galt, Vasquez

handed defendant the steel bar which had flesh and hair residue on it, stating he had to take out a witness. Defendant, still wearing his gloves, wiped blood off the bar and set it down on the floorboard. He was uncertain whether there was blood on his pants when he left McConnell's house; some might have come off the bar when he placed it on the floorboard. He denied having wiped any blood off of his shoes. Bolanos and Vasquez told him to throw the bar out his window into the river; he complied.

The three drove to Vasquez's brother Manuel's house. Defendant changed into a pair of Manuel's pants. Manuel contacted Raul Barron, whom they met at Vasquez's sister Irma's house. Defendant backed the car into her garage and plugged in the stereo; Barron bought it for $100. Bolanos, Vasquez and defendant drove to Lodi, divided the money, bought some beer, then drove to the home of an acquaintance to purchase narcotics.

Defendant's girlfriend, Barbara Murillo, was questioned as a hostile witness by the defense. She and defendant were living together in Lodi shortly before the murder; at that time she had a two-year-old daughter by him and was pregnant with his second child. Six months after the murder she ran into Cobarrubio at the Grape Festival. Murillo believed defendant was the murderer. But when she asked Cobarrubio for further details about the crime, the latter claimed defendant had been "set up" because he had no backup in the area, while Vasquez had a network of local friends.

Cobarrubio was questioned on the matter. She recalled running into Murillo at the Grape Festival and being asked if defendant had committed the murder. She responded affirmatively. Murillo then asked Cobarrubio if she thought defendant "might have been set up." She

replied: "Well, he might have." Cobarrubio testified further that in fact she had no information from any source that defendant had been set up. She had answered Murillo's inquiry to that effect because she knew defendant was protesting his innocence and felt sorry for Murillo, who seemed to still care about defendant.

B. GUILT PHASE ISSUES

Defendant raises a number of contentions relating to the issue of guilt. None, as we shall show, warrants reversal.

1. *Validity of the Arrest Warrant*

Defendant asserts the invalidity of his arrest warrant on two grounds: (1) that it was facially invalid because it was based solely on the uncorroborated accusation of accomplice Robert Bolanos (see *People* v. *Campa* (1984) 36 Cal.3d 870 [206 Cal.Rptr. 114, 686 P.2d 634]); and (2) that material facts tending to negate the reliability of Bolanos's information were omitted from the affidavit in support of the warrant. (See *People* v. *Kurland* (1980) 28 Cal.3d 376 [168 Cal.Rptr. 667, 618 P.2d 213].) He argues that his bloodstained shoes and extrajudicial statements should have been suppressed as the fruits of his illegal arrest.

The arrest warrant was not challenged on these grounds in the trial court. "[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal [citations]." (*People v. Rogers* (1978) 21 Cal.3d 542, 548 [146 Cal.Rptr. 732, 579 P.2d 1048]; *People v. Easley* (1983) 34 Cal.3d 858, 869 [196 Cal.Rptr. 309, 671 P.2d 813]; see Evid. Code, § 353.) The contrary rule would

deprive the People of the opportunity to make their record on the matter and cure the defect at trial. (*People* v. *Rogers, supra*, 21 Cal.3d at p. 548, and cases cited.) "Because of [his] failure to make a timely and specific objection on this ground ... the point must be deemed waived." (*People* v. *Green* (1980) 27 Cal.3d 1, 22 [164 Cal.Rptr. 1, 609 P.2d 468].)

While acknowledging trial counsel's failure to challenge the arrest warrant, defendant urges us to reach the merits of his claim on the ground that failure to do so constituted ineffective assistance of counsel. In order to establish such inadequacy, he must demonstrate that counsel failed to perform with reasonable competence, and that it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel's failings. (*People* v. *Fosselman* (1983) 33 Cal.3d 572, 583-584 [189 Cal.Rptr. 855, 659 P.2d 1144]; *People* v. *Pope* (1979) 23 Cal.3d 412, 425 [152 Cal.Rptr. 732, 590 P.2d 859, 2 A.L.R.4th 1].) Defendant has failed to meet his burden. Our review is limited to consideration of the facts established by the appellate record.

a. Reliability of Accomplice-informant Bolanos's Hearsay Statements

In *People* v. *Campa, supra*, 36 Cal.3d 870, we affirmed the trial court's determination that defendant's arrest was illegal because the affidavit in support of his arrest warrant failed to establish probable cause. There, a van had pulled alongside a car and, after a brief exchange of words between a passenger in the van and the driver of the car, the van passenger fired several shots into the car, wounding the driver and killing the passenger. Subsequent investigation led to one Richard Martinez, whose parents owned the van. Placed under arrest for

murder and interrogated, Martinez admitted his participation in the incident, but stated Campa had done the actual shooting. A warrant was procured for Campa's arrest based upon Martinez's statement.

Since Campa's crime occurred prior to the adoption of Proposition 8, we applied principles of California constitutional law theretofore unimpacted by that initiative measure. (*People* v. *Smith* (1983) 34 Cal.3d 251, 262 [193 Cal.Rptr. 692, 667 P.2d 149].) We relied on *People* v. *Hamilton* (1969) 71 Cal.2d 176 [77 Cal.Rptr. 785, 454 P.2d 681], wherein we stated that "for an affidavit based on an informant's hearsay statement to be legally sufficient to support the issuance of a ... warrant, two requirements must be met: (1) the affidavit must allege the informant's statement in language that is factual rather than conclusionary and must establish that the informant spoke with personal knowledge of the matters contained in such statement; and (2) the affidavit must contain some underlying factual information from which the magistrate issuing the warrant can reasonably conclude that the informant was credible or his information reliable."[3] (*Id.*, at pp. 179-180.)

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3. In *Campa, supra*, 36 Cal.3d 870, we recognized that *Hamilton* and its progeny relied upon the "essentially identical two-part test" laid down by the United States Supreme Court in *Aguilar v. Texas* (1964) 378 U.S. 108, 114 [12 L.Ed.2d 723, 728-729, 84 S.Ct. 1509], and *Spinelli v. United States* (1969) 393 U.S. 410, 413 [21 L.Ed.2d 637, 641-642, 89 S.Ct. 584]. However, we deemed the *Aguilar* test "a convenient shorthand articulation of previously established principles of California law in the area of hearsay affidavits." (*Campa, supra*, 36 Cal.3d at p. 880.) In *Illinois v. Gates* (1983) 462 U.S. 213 [76 L.Ed.2d 527, 103 S.Ct. 2317], the Supreme Court abandoned the *Aguilar-Spinelli* "two-pronged test" and substituted a "totality-of-the-circumstances" analysis. Since McConnell was murdered prior to the effective date of Proposition 8 (June 9, 1982), we have no occasion to consider the effect, if any, of the United States Supreme Court's decision in *Illinois v. Gates* upon the facts of

In *Campa* we concluded that accomplice Martinez's affidavit contained no factual information relative to his credibility — the second *Aguilar* prong, *supra*, 378 U.S. 108 — other than that he was himself in custody on a murder charge and had admitted his participation in the crime. We explained further: "This is not to say that in all such cases the statement of a coparticipant implicating a suspect in criminal activity should be disregarded in finding probable cause for issuance of a warrant. Admissions may be made under circumstances in which their credibility is enhanced. Other 'indicia of reliability,' such as ... corroborative evidence obtained independently may buttress the credibility of an arrestee's statement." (*Campa, supra*, 36 Cal.3d at pp. 883-884; see *People* v. *Scoma* (1969) 71 Cal.2d 332, 337-338 [78 Cal.Rptr. 491, 455 P.2d 419], and cases cited.)

Although the magistrate and parties below did not have the benefit of a reading of Campa, reasonably competent counsel at that time would have been familiar with the principles reiterated in this court's earlier cases which applied the *Aguilar-Spinelli* test. Here, the circumstances of the crime and evidence found at the crime scene — as summarized in the affidavit — corroborated Bolanos's statement. Bolanos asserted the murder was committed in the course of a burglary during which McConnell's stereo was stolen and later fenced — the affiant, Detective Holman, declared that the victim's house had been found ransacked. Bolanos stated defendant had beaten the victim with an iron bar causing defendant to become splattered with blood — such was consistent with the nature of the victim's injury ("blunt trauma to the head") noted in the autopsy results incorporated into the affidavit.

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this case. (*Campa, supra*, 36 Cal.3d at p. 885, fn. 5.)

Moreover, although defendant stresses that Bolanos had a self-serving interest in "pegging" him as the actual killer, all three participants in the burglary (defendant, Vasquez and Bolanos) shared felony-murder liability for McConnell's murder. In his statement, Bolanos confessed to his own role in the planning, participation and aftermath of the burglary; nothing therein suggested he had withdrawn from the criminal conspiracy at any time. Nor does defendant attempt to challenge the sufficiency of the affidavit to support his arrest under the warrant for *burglary*.

Mindful of the preference to be accorded warrants in doubtful or marginal cases (see *Campa, supra*, 36 Cal.3d at p. 884, and cases cited), trial counsel could reasonably have concluded that the affidavit contained sufficient corroboration of Bolanos's hearsay statement; that the arrest warrant thus issued on probable cause; and that a de novo motion to quash the warrant would have proved futile.[4] Defendant has not met his burden of showing that failure to challenge the warrant on this ground amounted to ineffective assistance of counsel.

b. Omission of Material Facts From the Affidavit

Defendant argues there were four material omissions from the affidavit in support of the arrest warrant: (1) Deputy Holman had never heard the name Fernando Belmontes prior to Bolanos's statement, although

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4. We note that counsel did move to suppress the "fruits of defendant's arrest" on other grounds. Counsel sought exclusion of defendant's extrajudicial statements as involuntary; moved to suppress defendant's bloodstained shoes on the ground that their seizure was beyond the lawful scope of a search incident to arrest pursuant to warrant; and vicariously sought to suppress the fruits of Bolanos's statement to police on grounds that he was unlawfully detained, searched and arrested.

Vasquez was on the police list of people recently in contact with the victim; (2) the black Chevy described by Lucy Flores, McConnell's neighbor, was traced to Bolanos and impounded before he furnished his statement; (3) Bolanos had initially reacted to police questioning by lying and denying any knowledge of the crime; and (4) his eventual inculpatory statement was prompted not by good citizenship, remorse or a guilty conscience, but rather by the police confronting him with his girlfriend's incriminating statements.

Recognizing that the record is incomplete because this claim was not litigated in the trial court to determine whether the omissions were intentional, reckless or negligent, defendant nevertheless urges us to reach the merits of his claim because the omissions were negligent "as a matter of law." For reasons already noted, the point has been waived on appeal. (*People* v. *Green, supra*, 27 Cal.3d at p. 22.)

Nor was trial counsel incompetent in failing to attack the arrest warrant on this ground. Prior to the effective date of Proposition 8, Kurland applied. (*People* v. *Kurland, supra*, 28 Cal.3d 376; see *In re Lance W.* (1985) 37 Cal.3d 873, 896 [210 Cal.Rptr. 631, 694 P.2d 744]; compare *Franks* v. *Delaware* (1978) 438 U.S. 154, 155-156 [57 L.Ed.2d 667, 672, 98 S.Ct. 674].) Although Kurland speaks to search warrants, the test is equally applicable to omissions from arrest warrants. (*People* v. *Anderson* (1983) 149 Cal.App.3d 1161, 1164 [197 Cal.Rptr. 413]; see *People* v. *Sesslin* (1968) 68 Cal.2d 418, 424 [67 Cal.Rptr. 409, 439 P.2d 321].)

Counsel could competently have concluded that the omitted facts were either immaterial, or their omission reasonable. In either situation no sanction is imposed and, assuming the affidavit otherwise supports probable

cause, the warrant usually stands. (*Kurland, supra*, 28 Cal.3d at pp. 387-388.) Omissions are "material" only if they rendered the affidavit substantially misleading, i.e., if there was "a substantial possibility [the omitted facts] would have altered a reasonable magistrate's probable cause determination." (*Id.*, at p. 385.)

It is difficult to see how the officer-declarant's unfamiliarity with defendant would have borne upon *Bolanos's* reliability — the precise matter at hand. Nor did omission of the fact that Bolanos's Chevy was impounded shortly before he furnished his statement diminish its reliability. If anything, inclusion of the fact that his vehicle had been identified would have corroborated his claim that he drove the participants to the crime scene. Nor would Bolanos's truthful statement — furnished after he learned his girlfriend had incriminated him — necessarily have been more reliable had it been shown to be motivated by "good citizenship" or "remorse." Inclusion in the affidavit of the circumstance that Bolanos's statement conformed to his girlfriend's report to police of what he had told her about the crimes would also have further enhanced its reliability. Lastly, although Bolanos may have initially denied knowledge of or involvement in the crime, it was his own incriminating admissions in his statement, together with other corroborative facts in the affidavit, upon which the magistrate could justifiably rely in assessing the reliability of Bolanos's statement.

Defendant has failed to show a "substantial possibility" that inclusion of these facts in the affidavit would have altered the magistrate's determination of probable cause. He has thus not met his burden of demonstrating that failure to attack the warrant on this ground constituted ineffective assistance of counsel.

2. *Admission of Defendant's Extrajudicial Statements*

Defendant contends that his pretrial statements, in which he made inculpatory admissions of involvement in McConnell's murder, should have been suppressed as the involuntary products of threats and/or promises of leniency by the homicide investigators. Specifically, he condemns the officers' use of the "technique of invoking the threat of the death penalty and then offering the hope of leniency through the means of confession."

Six days after the murder, San Joaquin Detectives Elbert Holman and Lyle Cooper, armed with the arrest warrant, traveled to San Bernardino County and took defendant into custody at his mother's home in Ontario. He was taken to the Ontario Police Department for questioning and advised of his *Miranda* rights (*Miranda* v. *Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 649,86 S.Ct. 1602, 10 A.L.R.3d 974]). Defendant acknowledged he understood his rights, waived them, and indicated his desire to speak with the officers. The waiver of rights and ensuing statement were tape-recorded.

In his first statement, defendant admitted knowing Bolanos, Vasquez and McConnell. He admitted having been to McConnell's house twice in January and February of that year. He had spent the previous weekend with Bolanos in Lodi. At first he claimed he had not been to Vasquez's house on the Sunday of the murder; thereafter he admitted having gone there. He claimed he had come to Ontario to be with his girlfriend. He denied having discussed burglarizing McConnell's residence while at Vasquez's house; being with Bolanos or Vasquez in Galt on Sunday morning; parking around the corner and walking to McConnell's house to break in; hitting her with the dumbbell bar as Bolanos and Vasquez were heard driving up; taking the stereo; attempting to throw the bar

into the Mokelumne river; or selling the stereo in Lodi. When given an opportunity to ask questions, defendant wanted to know if Bolanos and Vasquez were already in custody, and was told they were in jail in Stockton charged with the murder. The interview was concluded and the tape recorder turned off.

Deputy Holman testified that after turning off the machine defendant was told they would be going back to Stockton. Holman stated to defendant: "Thanks for lying to me." When defendant expressed surprise, Holman added: "Why do you think we came down here and got you by name if we didn't know the story prior to coming down here?" Defendant asked for a minute to think about it, then indicated he wanted to "tell [Holman] what had happened." Holman advised defendant he would not continue taking the statement unless the tape recorder was turned back on, and this was done. Less than three minutes had elapsed since the conclusion of the first statement. Holman testified he did not recall either he or Deputy Cooper ever mentioning to defendant, in the two or three minutes that the tape recorder was turned off, that "this was a death penalty case." He recalled Deputy Cooper telling defendant that "the whole case was lying on him"; which Holman felt accurately characterized the status of the investigation up to that point. Holman never told defendant they had him "dead to rights"; it was defendant who had first used that expression.

Deputy Cooper testified that during the break between statements, Holman told defendant he would be going back to Stockton to stand trial, that it was "a homicide case," that "he would have a long time to think about it," "and he may have even been told it was a — in our estimation a death penalty case. I don't recall if we told him that. [¶] I believe he was told there was no bail, again. That's about the extent of it. It was a very short

conversation." Cooper testified that if the term "death penalty" was mentioned, it was not intended to scare defendant. Finally, his comment to defendant that "you want to clear it up so that its not all laying [*sic*] on you" was merely a reference in context to defendant's own earlier exclamation to that effect.

The transcript of the second tape-recorded statement supports the officers' testimony. Defendant indicates therein that Holman had not coerced him into making a second statement by use of the term "dead to rights"; that he had not been threatened or promised anything to make a second statement; that less than three minutes had elapsed since the tape recorder had been turned off; and that he had volunteered during the break that he had not been truthful in the first statement and now desired to level with the officers.

In his second statement — which defendant testified he furnished "because only three people knew what had happened, yet the deputies seemed to know everything" — defendant claimed the incident was planned as a "stupid little burglary." He approached McConnell's house alone on foot; when he knocked and found her home he entered and they talked. He was not carrying the metal bar. When Bolanos drove up, he thought they would all talk some more and leave. Instead, Vasquez came to the door and hit McConnell "two or three" times. They grabbed the stereo and ran. The rear bedroom was never ransacked. Bolanos and Vasquez told him to throw the bar out the car window. He got some blood on his pants but thought Vasquez did too.

Defendant's third tape-recorded statement was taken on the following day in the San Joaquin County jail. He was again *Mirandized*, waived his rights, and does not here challenge the voluntariness of that statement on

separate grounds. He admitted therein to being armed with the dumbbell bar upon entering McConnell's house. After speaking with her for a few minutes, Vasquez arrived and pushed the front door open, McConnell immediately recognized him, Vasquez ordered defendant to "hit her," and defendant complied. He claimed he hit McConnell only once in the head with the bar, knocking her to the floor. He proceeded to break down the bedroom door, search the closet, then remove the stereo components from the front of the house to Bolanos's waiting Chevy. Defendant stated he did not pay attention to Vasquez's actions during this period, nor did he directly observe how McConnell came to have suffered the 15 to 20 fatal blows to her head.

The burden is on the prosecution to prove the voluntariness of a confession beyond a reasonable doubt. (*People* v. *Murtishaw* (1981) 29 Cal.3d 733, 753 [175 Cal.Rptr. 738, 631 P.2d 446]; *People* v. *Jimenez* (1978) 21 Cal.3d 595, 608 [147 Cal Rptr. 172, 580 P.2d 672].) That requirement applies equally to a defendant's incriminating admissions. (*Murtishaw, supra*, 29 Cal.3d at p. 753.)

It is well settled that "mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary." (*Jimenez, supra*, 21 Cal.3d at p. 611.) As we stated in *People* v. *Hill* (1967) 66 Cal.2d 536 [58 Cal.Rptr. 340, 426 P.2d 908], the distinction between permissible and impermissible police conduct "does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by the defendant if he speaks the truth as represented by the police." (*Id.*, at p. 549.) In terms of assessing inducements assertedly offered to a suspect, "'[w]hen the benefit pointed out by the police

... is merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made [citation]." (*Jimenez, supra*, 21 Cal.3d at pp. 611-612.)

Our role as a reviewing court is ""to examine the uncontradicted facts to determine independently whether the trial court's conclusion of voluntariness was properly found ...." [Citations.]'" (*People* v. *McClary* (1977) 20 Cal.3d 218, 227 [142 Cal.Rptr. 163, 571 P.2d 620].) If there is "conflicting testimony, the court must 'accept that version of events which is most favorable to the People, to the extent that it is supported by the record.' [Citation.]" (*People* v. *Hogan* (1982) 31 Cal.3d 815, 835 [183 Cal.Rptr. 817, 647 P.2d 93].)

Our independent review convinces us that no improper threats or promise of leniency were made to defendant. Deputy Holman testified that he did not, as defendant contends, "threaten him with the death penalty." Deputy Cooper's best recollection was that the term "death penalty" *may* have been mentioned at some point, but that if it was, it was not done so with intent to scare or coerce defendant into confessing. To the extent their testimony conflicted on whether the "death penalty" was ever mentioned, we must accept that version most favorable to the People. (*People* v. *Hogan, supra*, 31 Cal.3d at p. 835.)

Moreover, defendant's own responses at the beginning of his second tape-recorded statement support the officers' testimony that he was not "threatened" with the death penalty, nor were any promises of benefit or leniency offered as inducement for his statements. Belmontes acknowledged he lied in all three of his statements to police. He testified his intent during the first statement was to deny everything: "I was holding my mug." His

intention in his second statement was to tell enough of the truth so that he would be believed, but no more than necessary. Defendant's own behavior and testimony virtually precludes a conclusion that his free will was overborne by the substance or manner of the interrogation. (See *People* v. *Johns* (1983) 145 Cal.App.3d 281, 292-293 [193 Cal.Rptr. 182].)

Nor does the record support defendant's further assertion that the officers unduly coerced his statements by falsely suggesting that Vasquez and Bolanos were claiming he was the lone murderer because he was not a "home boy." At the time of defendant's questioning, Bolanos and Vasquez were in custody for the murder, and Bolanos had related that defendant went into the house first and thereafter came out with blood on him. Based upon the information they had at that point, it was reasonable for the officers to suspect defendant as the actual killer. Defendant acknowledged that it was the factual detail revealed in the officers' questions which led him to conclude that Vasquez and Bolanos had "snitched him off."

Applying the applicable standards to the facts, we conclude that the trial court properly ruled the statements admissible.

3. *Defense Counsel's Potential Conflict of Interest*

One week after the filing of the information and prior to severance, the public defender, representing codefendant Vasquez, filed a motion to recuse defendant's trial counsel, John Schick, on grounds of an alleged conflict of interest stemming from Schick's "prior representation" of Vasquez. Schick was a named partner in the law firm which prior to 1980 had been under contract as the conflict public defender for San Joaquin

County. Two years earlier, another attorney in Schick's law firm had represented Vasquez on another murder charge. That case never went to trial; the charge against Vasquez was ultimately dismissed.

In opposing his recusal, Schick filed a declaration in which he stated (1) that he was not in possession of any information relating to this case obtained through any confidential communication with Vasquez; (2) that he had made no personal appearances on behalf of Vasquez; and (3) that the office file on Vasquez's 1979 case had been destroyed over eight months earlier. At the hearing on the motion, Schick further represented that the attorney who had represented Vasquez in 1979 was no longer employed in his firm and was in private practice in Manteca. Vasquez's counsel conceded that "[c]ertainly if there were to be a severance granted, then that would go a long way towards clearing up those [potential conflict of interest] kinds of problems. But at this point as the District Attorney indicated, that is not necessarily the case. So I feel the problems are still there."[5]

The court denied the motion to recuse Schick, concluding that under the circumstances there was no conflict of interest nor the potential for one to arise. Defendant was present and heard counsel's representations and arguments at the hearing. At its conclusion, defendant was asked: "Do you wish and is that still your desire to have [Schick] represent you?" Defendant responded, "Yes."[6]

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5. Defendant's and Vasquez's cases were thereafter severed on August 31, 1981.

6. In a related matter, the court granted Vasquez's motion to recuse an investigator whom Schick had hired to work on Belmontes's case, because the investigator was still employed in the public defender's office on a part-time basis at the time Schick retained his services.

Defendant argues that reversal is required due to a conflict or potential conflict of interest arising from Schick's law firm's prior representation of Vasquez.

"It has long been established that 'the "assistance of counsel" guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.' (*Glasser v. United States* (1942) 315 U.S. 60, 70 [86 L.Ed. 680, 699, 62 S.Ct. 457]; accord *People* v. *Chacon* (1968) 69 Cal.2d 765, 774 [73 Cal.Rptr. 10, 447 P.2d 106, 34 A.L.R.3d 454].)" (*Leversen* v. *Superior Court* (1983) 34 Cal.3d 530, 536-537 [194 Cal.Rptr. 448, 668 P.2d 755].) Although the classic conflict situation involves joint representation of codefendants in the same action, "[t]he same principles apply when counsel represents clients whose interests may be adverse even when they are not codefendants in the same trial. [Citations.]" (*People* v. *Mroczko* (1983) 35 Cal.3d 86, 105 [197 Cal.Rptr. 52, 672 P.2d 835].)

"When a trial court undertakes to appoint counsel for indigent codefendants (see *People* v. *Chacon* [1968] 69 Cal.2d 765 [73 Cal.Rptr. 10, 447 P.2d 106, 34 A.L.R.3d 454]), it must assume the burden of assuring that its appointment does not result in a denial of effective

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In so ruling, the court stated it "was satisfied without any question ... [the investigator] did not have any information or was not privy to any that would have been of conflict in any way in this particular case." The investigator was nevertheless recused "[s]o there wouldn't be any thought he might have information that in some way came to him later."

In connection with that ruling, the court had again asked defendant if he "wanted other counsel based on [the investigator's] employment," to which he replied: "No, I'll stay with the lawyer I have."

counsel because of some possible conflict. [Citations.]" (*People* v. *Cook* (1975) 13 Cal.3d 663, 671 [119 Cal.Rptr. 500, 532 P.2d 148], cert. den. (1975) 423 U.S. 870 [46 L.Ed.2d 100, 96 S.Ct. 135]; *Maxwell* v. *Superior Court* (1982) 30 Cal.3d 606, 612 [180 Cal.Rptr. 177, 639 P.2d 248, 18 A.L.R.4th 333].) Where the evidence conflicts "concerning the nature and extent of the past and present attorney-client relationship, the trial court's findings based upon such conflicting evidence are conclusive on appeal. [Citations.]" (*People* v. *Yorn* (1979) 90 Cal.App.3d 669, 674 [153 Cal.Rptr. 295].)

We have held that "even a potential conflict may require reversal if the record supports 'an informed speculation' that appellant's right to effective representation was prejudicially affected." (*People* v. *Mroczko, supra*, 35 Cal.3d at p. 105.) But "[p]ermissible speculation giving rise to a conflict of interest may be deemed an informed speculation ... only when such is grounded on a factual basis which can be found in the record." (*People* v. *Cook, supra*, 13 Cal.3d at pp. 670-671.)

Here the record does not establish an actual or potential conflict of interest. Attorney Schick, an officer of the court, ""[was] in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." [Citation.]'" (*People* v. *Mroczko, supra*, 35 Cal.3d at p. 112.) He represented to the court that he personally had no prior contact with Vasquez. The attorney from Schick's firm who had handled Vasquez's earlier case was now in private practice in another locale; the file in that case had long since been destroyed.

Alternatively, defendant urges that Schick's ethical obligations to his firm's former client precluded him — perhaps subliminally — from fully exploiting Vasquez's

prior criminal record in the presentation of Belmontes's defense. At oral argument appellate counsel suggested that Schick might have "self-censored himself" as a result of the conflict; at another point counsel took an opposite tack, suggesting Schick "didn't see the potential for conflict."

Trial counsel's performance, however, lends little support to the argument. Throughout the guilt and penalty phases Schick characterized Vasquez as the "ringleader" of the planned crime, emphasizing that Vasquez was older than defendant, and urging the jury to consider Vasquez's reputation in the local community; his infidelity and mistreatment of Carrie Rogers who was supporting him; his former relationship with the victim; his threats to her right up through the morning of the murder; and his motive — consistent with defendant's claims — to do harm to McConnell, who had thrown him out of her house after he "ripped her off" several days prior to the murder. Further evidence of Vasquez's prior "specific instances of violent conduct," especially an earlier *charge* (the 1979 murder charge) *which had been dismissed*, would have been inadmissible to prove his conduct in the instant criminal episode. (Evid. Code, § 1101, subd. (a); Witkin, Cal. Evidence (2d ed. 1966) § 324, p. 287.) Moreover, given that the prosecution was proceeding on felony murder and conspiracy theories of vicarious liability, trial counsel had to weigh the tactical disadvantages of having the defense strengthen the case against Vasquez, thereby enhancing defendant's vicarious liability for Vasquez's criminal acts in the jurors' eyes.

The record affords no informed basis for concluding that a conflict of interest existed or affected trial counsel's performance to defendant's detriment.[7]

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7. In so concluding, we need not reach defendant's further claim

4. *Admissibility of Bolano's and Cobarrubio's Prior Consistent Statements*

Defendant contends that evidence of prior consistent statements of Bolanos and his girlfriend, Teresa Cobarrubio, were erroneously admitted without meeting the foundational requirements of Evidence Code sections 791 and 1236.[8/]

Bolanos testified that he told Cobarrubio on the day after the murder defendant was the one who had killed McConnell during the burglary. No timely objection having been made to this testimony; the point has been waived on appeal. (*People* v. *Cannady* (1972) 8 Cal.3d 379, 388 [105 Cal.Rptr. 129, 503 P.2d 585]; *People* v. *Green, supra*, 27 Cal.3d at p. 22.) Defendant's purported citation to an objection on this point is unavailing. The "objection" he notes in the record went to Bolanos's testimony on a different matter (his initial false statement regarding the disposal of McConnell's stereo); was made on a nonhearsay ground; and was raised well beyond the point at which Bolanos gave the testimony here challenged.

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that his waiver of the potential conflict of interest was not a knowing and informed one.

8. Section 1236 provides: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791."
Section 791 provides: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:
"(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
"(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated ... and the statement was made before the ... motive for fabrication ... is alleged to have arisen."

Cobarrubio's testimony confirmed that Bolanos told her defendant had killed McConnell. This time there was an objection; to which the prosecutor responded: "We're offering it as a prior statement of Mr. Bolanos, given at a time when the motive imputed to him for why he should want to lie didn't exist."

One motive for fabrication or bias in Bolanos's testimony, explored at length during his cross-examination, was his favorable immunity agreement obtained in exchange for his testimony at defendant's trial. Defendant himself recognizes: "Of course Bolanos also had a strong motive to shift as much legal and moral culpability away from himself and on to the others [Belmontes and Vasquez] as well."

Bolanos had not yet been granted immunity from prosecution for the murder at the time he related the prior statement — consistent with his trial testimony — to Cobarrubio. An immunity agreement has been recognized as a motive for bias within the meaning of Evidence Code section 791. (*People* v. *Pic'l* (1981) 114 Cal.App.3d 824, 862-863 [171 Cal.Rptr. 106].) "That there may always have existed another motive for fabricating did not deprive the prosecution of its right to show that a motive shown by the evidence did not affect the witness' testimony [citation]." (*People* v. *Cannady, supra*, 8 Cal.3d at p. 388.) Bolanos's prior consistent statement to Cobarrubio was thus admissible under Evidence Code section 791, subdivision (b).

Lastly, Deputy Gary Coffey testified about the statement he took from Cobarrubio prior to Bolanos's questioning and arrest. There was a hearsay objection; the prosecutor responded that evidence of Cobarrubio's prior statement was "being offered to rehabilitate her, after counsel suggested she was lying on the stand. ..."

Counsel impeached Cobarrubio on cross-examination with her statement to defendant's girlfriend, Barbara Murillo, made several months after the crime, to the effect that she might have agreed with Murillo that defendant could have been "set up." This statement was inconsistent with Cobarrubio's trial testimony. Evidence of her earlier statement to Deputy Coffey was inconsistent with her statement to Murillo — consistent with her trial testimony — and thus admissible as a prior consistent statement. (Evid. Code, §§ 791, subd. (a) & 1236.)

5. *Curtailment of Impeachment of Prosecution Witness Carrie Lynn Rogers*

Defendant argues that the court improperly restricted his cross-examination of prosecution witness Carrie Lynn Rogers regarding her motive for bias and fabrication.

On the date of the offense, Domingo Vasquez was living with Rogers, their daughter, and a friend, Laura Hernandez. Rogers subsequently married Vasquez in jail three months after his arrest for McConnell's murder. Vasquez's motion to dismiss the felony-murder-burglary special circumstance as to him was granted. He ultimately pled guilty to second degree murder and second degree burglary and was sentenced to an indeterminate term of 15 years to life.

Rogers did not come forward to implicate defendant as the actual killer until shortly before the start of his trial. On direct examination, she testified that after the crime Vasquez refused to tell her why he had been picked up for questioning by the police. On the night following the murder, while in her kitchen, she overheard defendant discussing the murder with Vasquez and Bolanos in the living room, and heard defendant review how he had first

entered McConnell's house alone and hit her several times with the bar, after which Vasquez had joined him in the house.

Prior to Rogers's cross-examination, defense counsel moved for permission to question her about the disposition of Vasquez's case. The theory of relevance was that Rogers's belated claim that defendant was the killer was motivated by her desire to promote her husband's chances for early release on parole. Defendant asserts that "[t]he indeterminate sentence disposition of Domingo Vasquez's case and the wide range of potential prison confinement provided Carrie Rogers Vasquez with a powerful motive to portray [defendant] as the ringleader and killer. An early release — or indeed any release — of Vasquez depends in large measure upon his involvement in the offense and his level of culpability. Mrs. Vasquez could well be expected to so understand, believe or hope. The jury was deprived of powerful impeachment evidence."

The prosecutor countered that there was undue potential for prejudice and misuse of the information,[9] and that counsel's theory of relevance for impeachment was highly speculative. The court prohibited cross-examination in this vein.

We recognize that "'[w]hile the trial judge has broad discretion to control the ultimate scope of cross-examination designed to test the credibility or

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9. The jury was not told of Vasquez's negotiated plea to second degree murder, since the plea did not necessarily admit his role as the actual killer, could have been based on felony-murder-accomplice liability, and thereby could have served to enhance the prosecution's case against defendant. Evidence of Vasquez's disposition (an indeterminate prison term) was irrelevant to a determination of defendant's degree of participation or role in the crimes.

recollection of a witness (*People* v. *Burton* (1961) 55 Cal.2d 328, 343 [11 Cal.Rptr. 65, 359 P.2d 433]) ...'" (*Jennings* v. *Superior Court* (1967) 66 Cal.2d 867, 877 [59 Cal.Rptr. 440, 428 P.2d 304]), "wide latitude" should be given to cross-examination designed to test the credibility of a prosecution witness in a criminal case. (*Curry* v. *Superior Court* (1970) 2 Cal.3d 707, 715 [87 Cal.Rptr. 361, 470 P.2d 345].) Nevertheless, we are unpersuaded by defendant's argument that the ruling was so unduly restrictive as to violate his Sixth Amendment right of confrontation.

In *Delaware* v. *Van Arsdall* (1986) 475 U.S. 673, 680 [89 L.Ed.2d 674, 684, 106 S.Ct. 1431], the United States Supreme Court reaffirmed that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.' *Davis* v. *Alaska* [(1974) 415 U.S. 308, 94 S.Ct. 1105], at 318."

"But *Van Arsdall* emphasized that a trial judge has broad latitude in restricting cross-examination which is repetitive or only marginally relevant. (*Id.* [475 U.S. 673, 679-680].) There is no Sixth Amendment violation at all unless the prohibited cross-examination might reasonably have produced 'a significantly different impression of [the witness's] credibility. ...' (*Id.* [475 U.S. 673, 680].) If cross-examination was improperly restricted, the prejudicial effect of the error on the trial as a whole depends on a multitude of factors, including the cumulative nature of the lost information, the extent of cross-examination otherwise permitted, the degree of evidence corroborating the witness, and the overall

strength of the prosecution case. (*Id.* [475 U.S. 673, 684].)" (*People* v. *Rodriguez* (1986) 42 Cal.3d 730, 751, fn. 2 [230 Cal.Rptr. 667, 726 P.2d 113].)

Here the jury learned Rogers had been with Vasquez for eight years and had married him shortly after his arrest for McConnell's murder; that they had a daughter together; that she was seeing Vasquez on a weekly basis at the time of trial; that she had been living with Vasquez and supporting him on the date of the murder; that she knew Vasquez was keeping company with other women at that time and nonetheless "didn't do anything about it"; and that she did not come forward to report her information inculpating defendant as the killer until the eve of his trial. Nor did the prosecutor in his closing argument make any attempt to clothe Rogers with a false aura of veracity.[10/]

We conclude the trial judge was within his discretion in ruling that the proffered line of cross-examination was potentially prejudicial and would not reasonably have produced "a significantly different impression of [Rogers's] credibility. ..." (*Van Arsdall, supra*, 475 U.S. at

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10. The prosecutor conceded in his opening argument: "[C]ounsel has suggested to you [Rogers] has a very definite interest in protecting a man, Domingo Vasquez, with whom she lives. Certainly, ladies and gentlemen of the jury, somebody that would marry someone who's been involved in something like this, when he's been cheating on her and she knows about it, that's loyalty. What else can you call it? [¶] And you have to take that into account in deciding whether to believe [Rogers]. Let's face it. That really calls into question her story." Defense counsel picked up the thread in his own closing argument: "Carrie Rogers — and I certainly would second [the prosecutor's] comments about Carrie Rogers' motives to come in here and lie for a man who she has certainly stood by through thick and thin who certainly has not stood by her." And in his closing argument, the prosecutor invited the jury to discount Rogers's testimony "because she is loyal to Domingo."

p. 680 [89 L.Ed.2d at p. 684].) Even were we to assume error of constitutional magnitude, given the totality of circumstances under which Rogers's testimony was presented — particularly defendant's own testimony that he struck McConnell at least the one blow with the bar — no prejudice warranting reversal would be shown.

6. *Conflicting Instructions on Evaluation of Accomplice Testimony*

Defendant acknowledges that the court gave the full panoply of standardized instructions advising the jury that Bolanos was an accomplice as a matter of law (CALJIC No. 3.16); defining "accomplice" (CALJIC No. 3.10); and advising that his testimony had to be viewed with distrust (CALJIC No. 3.18) and needed corroboration (CALJIC Nos. 3.11 and 3.12). Defendant claims, however, that the purpose of these instructions was undermined to his prejudice by the giving of CALJIC No. 2.27, which allows the jury to find any fact on the testimony of one witness, and CALJIC No. 2.11.5, which cautions the jury against speculation as to the prosecution or nonprosecution of accomplices.

a. CALJIC No. 2.27

CALJIC No. 2.27 was requested *by defendant*. Trial counsel never proposed that it conflicted with the accomplice testimony corroboration requirement. Nevertheless, since the corroboration requirement of section 1111 is a "substantial right" we shall address the claim. (§ 1259; *People* v. *Chavez* (1985) 39 Cal.3d 823, 830 [218 Cal.Rptr. 49, 705 P.2d 372].)

In *Chavez, supra*, we held that the giving of CALJIC 2.27 in conjunction with accomplice instructions was not error per se, but we agreed with the suggestion of the

Court of Appeal in *People* v. *Stewart* (1983) 145 Cal.App.3d 967, 975 [193 Cal.Rptr. 799], that it should contain an explicit reference to testimony requiring corroboration. (*Chavez, supra*, 39 Cal.3d at p. 831.)

As in *Chavez*, here, looking to the instructions as a whole we find no error. (*Id.*, at pp. 830-831.) Both the prosecution and the defense proceeded on the premise that corroboration was needed. (*Id.*, at p. 831.) The prosecutor reiterated in his closing argument that Bolanos's testimony needed to be corroborated, cautioned that it must be viewed with distrust, and summarized the evidence which he believed would support defendant's guilty verdicts independent of Bolanos's testimony. Bolanos himself conceded that he was testifying because: "I'm ordered here or else that murder case would be up on me again if I'm not here," and acknowledged that he was more concerned about his own fate than that of defendant or Vasquez.

Moreover, the record belies defendant's assertion that Bolanos's testimony "went almost completely uncorroborated." It was corroborated by the testimony of Lucy Flores, Carrie Rogers, defendant's girlfriend Barbara Murillo, and crucially, by defendant himself. He admitted, both in his extrajudicial statements and trial testimony, that he first entered McConnell's house alone; dealt her the first blow with the iron bar; implored Vasquez to grab the stereo components and run; exited with blood on his clothes; wiped blood off the bar; and threw it in the river. He confirmed Bolanos was the "wheel man" and never entered the house. The murder weapon, recovered with Bolanos's assistance; defendant's bloodstained shoe; the number and severity of McConnell's head wounds; and the autopsy physician's testimony (that infliction of the blows would have made sounds like "a cracked pot"); all further corroborated Bolanos's account of the crimes.

We conclude there was no prejudicial error from the giving of unadorned CALJIC No. 2.27.

b. CALJIC No. 2.11.5

CALJIC No. 2.11.5 instructs: "There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which defendant is on trial. [¶] You must not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted."

There is no merit to defendant's claim that, so charged, the jury might have believed it was prohibited from considering the "nonprosecution" of Bolanos. The instruction was patently directed at Vasquez. The jury knew Bolanos had pled guilty to burglary, was awaiting imposition of sentence therefor, and had been granted immunity from prosecution for McConnell's murder. Defendant's suggestion that the jury might have understood CALJIC No. 2.11.5 as applying to Bolanos, thereby precluding them from weighing the existence or nonexistence of bias, interest or other motive in assessing his credibility (see CALJIC No. 2.20), is implausible. It would require us to find that the jury rejected nearly all of the accomplice testimony instructions and disregarded as irrelevant counsel's considerable efforts to impeach Bolanos in his cross-examination and closing argument.

Defendant further argues that the instruction "might have misled the jury into believing that Vasquez was not being prosecuted, although they could not consider why." He hinges this contention on the predicate in the instruction: "You must not discuss or give any

consideration as to why [a possible accomplice] is not being prosecuted in this trial. ..." In doing so he ignores the concluding clause of the instruction, which states: "or whether he has been or will be prosecuted." The instruction in its entirety itself defeats his claim.

7. *Instruction on Defendant's Failure to Deny or Explain Certain Evidence* (CALJIC No. 2.62)

The jury was instructed with CALJIC No. 2.62 (1980 rev.), which pertains to the inferences that might be drawn from defendant's failure to explain or deny prosecution evidence of facts within his personal knowledge. "It correctly explained that defendant has a constitutional right to decline to testify, but that his failure to deny or explain facts within his personal knowledge may be considered as supporting the prosecution evidence at issue. It also correctly advised that such failure to deny or explain does not create any presumption or warrant any inference of guilt, or relieve the prosecution of its proof burden." (*People* v. *Ghent* (1987) 43 Cal.3d 739, 763 [239 Cal.Rptr. 82, 739 P.2d 1250].) There was no objection to the instruction.

Defendant contends that "[t]he instruction in conjunction with the prosecutor's argument constituted prejudicial error because (1) the record discloses that [defendant] did *not* fail to explain or deny any prosecution evidence; and (2) the purported failures to explain or deny argued by the prosecution were tangential, collateral and of little importance."

We disagree on both counts. Defendant testified he heard Bolanos and Vasquez drive up, and that Vasquez came right to the front door and would not have had time to open Bolanos's trunk. But as the prosecutor argued, defendant failed to explain Bolanos's conflicting

testimony, corroborated by the testimony of a disinterested neighbor (Lucy Flores), that Vasquez *did* first attempt to open the trunk before entering the house.

Defendant testified he struck McConnell the one blow to the head with the bar, and that she fell to the ground but was "still breathing." But he failed to explain the autopsy surgeon's conflicting conclusion that the injury resulting therefrom in probability would not have rendered McConnell unconscious, nor how the victim would come to have suffered the many defensive wounds — clearly evidencing her struggle for life as she was being beaten — if his version was true.

Defendant testified that he ran through the rear of the house looking for things to steal, returning within seconds to find Vasquez standing over McConnell holding the bar. He denied ransacking the front master bedroom, testifying it "[m]ust have been [Vasquez]." But as the prosecutor fairly argued, defendant failed to explain how Vasquez could have beaten the victim so extensively and ransacked the master bedroom; all in a matter of "seconds." Defendant also claimed he neither saw nor heard Vasquez beating McConnell because he was not "paying attention," but he failed to explain how he could not have heard the 15 to 20 blows to the victim's head, which Bolanos heard from outside the house, and which, according to the autopsy surgeon, in all probability would have sounded "like a cracked pot" as they landed, cracking the victim's skull.

There were other crucial points of conflict between defendant's extrajudicial statements and trial testimony on the one hand, and the physical evidence and testimony of witnesses on the other. Without belaboring the point, our review of the record indicates that these and other such conflicts were hardly "tangential, collateral and of

little importance." "[I]f the defendant tenders an explanation which, while superficially accounting for his activities, nevertheless seems bizarre or implausible, the inquiry whether he reasonably should have known about circumstances claimed to be outside his knowledge is a credibility question for resolution by the jury [citations]." (*People* v. *Mask* (1986) 188 Cal.App.3d 450, 455 [233 Cal.Rptr. 181].)

8. *Doyle - Massiah Error*

Defendant contends that the prosecutor committed *Doyle* error (*Doyle* v. *Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91, 96 S.Ct. 2240]) when he cross-examined defendant regarding his postarrest silence. He further asserts that those same questions violated his right to counsel. (*Massiah* v. *United States* (1964) 377 U.S. 201 [12 L.Ed.2d 246, 84 S.Ct. 1199].) We conclude that under the circumstances the prosecutor's questions had the potential to, but did not, ripen into *Doyle* error. Nor did they infringe upon defendant's Sixth Amendment rights.

The offending colloquy went as follows:

"[PROSECUTOr]: Q. Mr. Belmontes, from the time you talked to Deputy Holman and Deputy Cooper at the San Joaquin County Jail on March 22nd, 1981, until today in this very courtroom you have never spoken to law enforcement concerning what happened on March 15th, 1981?

"[DEFENDANT]: A. Have I spoken to officers?

"Q. About it. That's right.

"A. From the first day I got arrested until now?

"Q. No. From the jail statement on Sunday, when you were booked in the county jail and gave the third statement we have been calling the jail statement, until now you've never told law enforcement officers about it, anything else that happened there?

"A. No.

"[DEFENSE COUNSEL]: Judge, in fairness, I think the jury should be instructed once he's appointed an attorney, that conversation has to be directed through the attorney.

"[THE COURT]: Yes. The question, ladies and gentlemen, is somewhat misdirected in the sense that Mr. Belmontes does not have to talk to anybody. As a matter of fact, he's admonished by his counsel, once lawyers have been appointed to represent him, not to talk to anybody. You should be aware of that fact. Without the presence of the lawyer.

"[PROSECUTOR]: Q. All right. So from then until now you haven't been on the record about what happened?

"[DEFENDANT]: A. Not on the record. But a few times Officer Holman has taken me to court while we were in Lodi we talked about it. But not on record.

"Q. About the details of the offense?

"A. Not really details. Just told him that I didn't do it. Told him that I was serious about when I said I hit the girl one time."

The petitioners in *Doyle* were arrested on narcotics charges. They were given *Miranda* warnings (*Miranda* v. *Arizona, supra*, 384 U.S. 436), made no postarrest

statements about their involvement in the crime, and for the first time at trial contended they had been framed by a government informant. During cross-examination the prosecutor repeatedly sought to impeach their exculpatory story by asking them why they had failed to assert the "frame-up" defense earlier. The trial court overruled defense counsel's timely objections to this line of inquiry, and permitted the prosecutor to argue petitioners' postarrest silence to the jury. (*Doyle, supra*, 426 U.S. 610 at pp. 613-615, and fn. 5 [49 L.Ed.2d 91 at pp. 95-96].) The high court reversed the convictions, holding that *Miranda* prohibited such questioning and argument as a proper means of impeachment. (*Id.*, at p. 617 [49 L.Ed.2d at p. 97].)

Here, the prosecutor did not ground his case on the theory that defendant had refused to talk to the police. Defendant waived his *Miranda* rights and furnished three statements. He testified that he voluntarily spoke with the officers about the crime en route from Southern California back to Stockton. In short, there were no *facts* supportive of an inference of "postarrest silence" placed before the jury. Indeed the defense itself urged that defendant's trial testimony was essentially consistent with his jailhouse statement made over a year earlier.

The Attorney General argues that the prosecutor's questions were merely designed to point out the inconsistencies between defendant's extrajudicial statements and trial testimony — a permissible avenue of impeachment. (See *People* v. *Barker* (1979) 94 Cal.App.3d 321, 329-330 [156 Cal.Rptr. 407]; *People* v. *Farris* (1977) 66 Cal.App.3d 376, 390 [136 Cal.Rptr. 45]; *People* v. *Love* (1977) 75 Cal.App.3d 928, 934 [142 Cal.Rptr. 532].) Perhaps that is where they were intended to lead. As worded, however, they just as readily could have elicited defendant's testimony that he made no statements about

the crime between his third jailhouse statement and trial, and thus technically ran afoul of *Doyle, supra,* 426 U.S. 610.

But upon counsel's objection to the questions, the trial judge immediately admonished the jury that "Mr. Belmontes does not have to talk to anybody" and that "he's admonished by his counsel ... not to talk to anybody." (See *Greer* v. *Miller* (1987) 483 U.S. 756, ___ [97 L.Ed.2d 618, 630-631, 107 S.Ct. 3102] [similar curative admonition].) "Unlike the prosecutor in *Doyle*, the prosecutor in this case was not 'allowed to undertake impeachment on,' or 'permit[ted] ... to call attention to,' [defendant's] silence." (*Id.*, at p. ___ [97 L.Ed.2d at pp. 630-631], quoting *Doyle, supra*, 426 U.S. at p. 619, & fn. 10 [49 L.Ed.2d at p. 98].)

Any error was clearly harmless beyond a reasonable doubt. (*Greer* v. *Miller, supra*, 483 U.S. at p. ___ [97 L.Ed.2d at p. 630]; *Chapman* v. *California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065]; cf. *People* v. *Jackson* (1980) 28 Cal.3d 264, 305 [168 Cal.Rptr. 603, 618 P.2d 149].) The prosecutor's questions were brief and unaccompanied by any suggestion that an inference of guilt should be drawn therefrom. Belmontes presented virtually no defense to the overwhelming evidence that a felony murder had occurred, namely, a murder committed in the course of a burglary. (§ 189.) The evidence further supported the jury's findings that he personally, intentionally, and wilfully administered the fatal beating to McConnell. When asked on direct examination: "Did you contribute to her death?" defendant replied: "Yes." When asked "How?" he acknowledged: "I was involved. I hit her. ..." Although he claimed he struck McConnell only the one blow across her temple, that wound was apparently of insufficient force to lacerate the victim's skin — a circumstance wholly

inconsistent with his own admission that he was covered with blood and that he alone had to change his pants at Manuel Vasquez's house after the crime. The nature of McConnell's gaping head wounds; the blood splattered about defendant's face, clothing, and the walls and door jambs next to where she was found; and the many defensive bruises on her arms, hands, legs and feet all evidenced a desperate struggle for life as defendant bludgeoned her with the iron bar.

We likewise reject defendant's related claim under *Massiah* v. *United States, supra*, 377 U.S. 201. There is no showing that the officers in this case at any stage of their investigation transgressed defendant's Sixth Amendment right to counsel. Having concluded that defendant's "postarrest silence" was neither shown by the evidence nor urged before the jury, we decline his further invitation to speculate that the prosecutor's complained-of questions "attribut[ed] a consciousness of guilt to the defendant for following his lawyer's advice ..." and remaining silent.

9. *Uncharged Conspiracy Instructions*

Both defendant and Bolanos revealed in their pretrial statements that they met with Vasquez at the latter's house on the morning of the murder and specifically agreed and conspired to burglarize McConnell's house. Defendant admitted in his statement that overt acts were carried out in furtherance of the planned crime prior to the point at which he knocked on McConnell's door and found her home. He had armed himself with the bar and split up from his cohorts who, according to predesigned plan, were to meet him at the house at a given time and assist in loading the stolen items into the trunk of Bolanos's Chevy.

However, defendant's claim that he personally abandoned any intent to steal when McConnell bid him entry, and his further assertion that shortly thereafter Vasquez had forced entry into the home and commanded him to strike the victim, were also reflected in his statement. Anticipating what would likely be the gist of Belmontes's defense in light of his pretrial statements, the prosecutor elected to proceed on an alternative uncharged conspiracy theory of vicarious liability in addition to the actual malice-premeditation and felony-murder theories of guilt.

Defendant acknowledges that the People proceeded on these three distinct theories of guilt. In his briefs he criticizes but "does not at this point challenge the validity of conspiracy theory in general to establish guilt of a substantive crime. ..."[11] Rather, he asserts error in (1) the failure to instruct that the existence of a conspiracy must be found beyond a reasonable doubt, and (2) the giving of CALJIC No. 6.20 which, he claims, improperly shifted the burden of proving withdrawal from the conspiracy onto him.

a. *Appropriateness of Uncharged Conspiracy Instructions*

Although not raised as a separate challenge to the

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11. Contrary to defendant's assertion, our review of the record reveals that the prosecutor announced his intention to proceed on an alternate conspiracy theory in his opening statement, and that defense counsel did not explicitly object to the prosecutor's election to proceed on such theory or to the standard conspiracy instructions requested and given. Counsel did separately submit his own request for aider-abettor liability instructions, which was denied. (See defendant's argument 11, post, at p. 793.)

verdicts of guilt, defendant cites law review commentary to "emphasize the illegitimacy" of permitting the prosecution to proceed on an alternate theory of uncharged conspiracy liability. He asserts such is more appropriately reserved for "combatting complex criminal organizations" or "providing a preemptive social defense against a dangerous design prior to the flash point when it becomes an attempt or completed crime." (See Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants* (1948) 62 Harv. L.Rev. 276, 284-286.)

It is long and firmly established that an uncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator. (*People* v. *Lopez* (1963) 60 Cal.2d 223, 250 [32 Cal.Rptr. 424, 384 P.2d 16] [uncharged conspiracy to commit burglaries admissible to prove identity of murderer]; *People* v. *Pike* (1962) 58 Cal.2d 70, 88 [22 Cal.Rptr. 664, 372 P.2d 656] [uncharged conspiracy to commit robberies admissible to prove armed robbery culminating in murder].) "Failure to charge conspiracy as a separate offense does not preclude the People from proving that those substantive offenses which are charged were committed in furtherance of a criminal conspiracy [citation]; nor, it follows, does it preclude the giving of jury instructions based on a conspiracy theory (*People* v. *Washington* (1969) 71 Cal.2d 1170, 1174 [81 Cal.Rptr. 5, 459 P.2d 259, 39 A.L.R.3d 541]; *People* v. *Ditson* (1962) 57 Cal.2d 415, 447 [20 Cal.Rptr. 165, 369 P.2d 714])." (*People* v. *Remiro* (1979) 89 Cal.App.3d 809, 842 [153 Cal.Rptr. 89, 2 A.L.R.4th 1135].)

The evidence here showed that defendant, Vasquez and Bolanos met, specifically intended to agree or conspire, specifically intended to commit the planned burglary, and carried out overt acts in furtherance of the conspiracy —

completing the intended crime. There being evidence supportive of all the elements of a conspiracy, the People were entitled to proceed on that alternative theory of liability. (*People* v. *Horn* (1974) 12 Cal.3d 290, 296 [115 Cal.Rptr. 516, 524 P.2d 1300].)

b. *Failure to Instruct on Existence of Uncharged Conspiracy Beyond a Reasonable Doubt*

The jury was charged with nine standardized instructions which fully defined all relevant principles underlying the People's alternative uncharged conspiracy theory of liability.[12/]
Defendant complains, however, that it was reversible error not to further instruct the jury that the existence of a conspiracy at the time of the killing must be proved *beyond a reasonable doubt* as a prerequisite for vicarious liability.[13/]

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12. These included the definition of an uncharged conspiracy and requisite overt act (CALJIC No. 6.10.5), and instructions explaining the nature of joint conspiratorial responsibility (CALJIC No. 6.11); that proof of express agreement was not required (CAJIC 6.12); that evidence of association alone does not prove membership in the conspiracy (CALJIC No. 6.13); that there is no criminal liability for independent acts of coconspirators not in furtherance of the common criminal design (CALJIC Nos. 6.15 and 6.16); that commission of an act in furtherance of a conspiracy does not itself prove membership in the conspiracy (CALJIC No. 6.18); that only an affirmative and bona fide rejection or repudiation of the conspiracy communicated to the coconspirators will effectuate withdrawal from the conspiracy (CALJIC No. 6.20); and that no shared criminal liability attaches to a conspirator's acts committed after termination of the conspiracy (CALJIC No. 6.21).

13. Although we address the claim on the merits, we note again that defendant failed to proffer a proposed instruction or otherwise object to the standard conspiracy instructions on this ground.

A similar contention was rejected in *People* v. *Jourdain* (1980) 111 Cal.App.3d 396 [168 Cal.Rptr. 702]. Jourdain, like defendant here, argued he was denied due process of law because the standard conspiracy instructions permitted the jury to connect him to the illegal uncharged conspiracy and thereby convict him upon a standard lower than "beyond a reasonable doubt."

In rejecting claimed error in the refusal to give defendant's proferred "beyond a reasonable doubt" instruction, the *Jourdain* court reasoned: "That argument misses the point. The People had not charged appellant with, nor were they trying to convict him of, conspiracy. ... [¶] The admission of [evidence of conspiracy] was not affected by the fact the information had not charged a conspiracy (*People* v. *Morales* ([1968]) 263 Cal.App.2d 368 [69 Cal.Rptr. 402]), and once there had been proof of the existence of the conspiracy there was no error in instructing the jury on the law of conspiracy. (*People* v. *Remiro* (1979) 89 Cal.App.3d 809, 842; *People* v. *Washington* (1969) 71 Cal.2d 1170, 1174.) In so charging the jury the court was not in any way indicating that appellant was being tried for the crime of conspiracy. Rather, the court was merely instructing the jury on the law applicable to the case. (Pen. Code, § 1093.). ... [¶] ... There was only one instruction on the burden of proof given to the jury. That instruction told the jury in terms of Penal Code section 1096 that it could not find appellant guilty until his guilt had been proved beyond a reasonable doubt. (CALJIC No. 2.90.)" (*People* v. *Jourdain, supra*, 111 Cal.App.3d at pp. 403-404.)[14]

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14. Jourdain argued his jury should have been instructed that it must find his *membership in the conspiracy* beyond a reasonable doubt. Here defendant argues the jury should have been instructed it must find *the existence of the conspiracy* beyond a reasonable doubt. For purposes of our analysis these distinctions are not critical. Jourdain's argument was essentially the same as

As instructed, the jury here was not told it could find defendant guilty on an uncharged conspiracy theory upon less than reasonable doubt. CALJIC No. 2.90 was given. Moreover, the jury's verdicts and special findings reflect that they found defendant's guilt of McConnell's murder beyond a reasonable doubt both on actual malice-premeditation and felony-murder-burglary theories.

c. *Impermissible Shifting of Burden of Proving Withdrawal From the Conspiracy*

We further reject defendant's argument that instructing the jury in accordance with CALJIC No. 6.20 (that only an affirmative and bona fide rejection or repudiation of the conspiracy communicated to the coconspirators will effectuate withdrawal from the conspiracy) impermissibly shifted the burden of proof on such matter to him. As we stated in *People* v. *Crosby* (1962) 58 Cal.2d 713, 731 [25 Cal.Rptr. 847, 375 P.2d 839]: "It is not part of the People's prima facie case to negate the possibility of such a withdrawal. Once the defendant's participation in the conspiracy is shown, it will be presumed to continue unless he is able to prove — as a matter of defense — that he effectively withdrew from the conspiracy ...."

Under CALJIC No. 6.20 the burden is upon the defendant to go forward with evidence of his withdrawal from the conspiracy. His burden is one of production — not persuasion beyond a reasonable doubt of his nonmembership in the conspiracy. Here, defendant made no attempt whatsoever to suggest how he had affirmatively withdrawn from or repudiated his role in the

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Belmontes's, i.e., that under the standard instructions "the jury could find him guilty of conspiracy upon something less than reasonable doubt." (*Jourdain, supra*, 111 Cal.App.3d at p. 403.)

conspiracy to burglarize McConnell's house, much less communicated the same to Vasquez.[15] Nor under these facts could he readily have done so — *by his own testimony* he felled McConnell with a blow to her head with the iron bar, immediately went about ransacking the rear rooms of her house, ripped out the wires and grabbed a stereo component, then had to urge Vasquez to assist in carrying out the booty as the two fled from the murder scene.

The People properly proceeded on the alternative uncharged conspiracy theory of liability. No prejudice from the giving of the standardized conspiracy instructions is shown.

10. *Special Findings*

The special findings made by the jury in connection with the verdict of guilt of first degree murder were as follows: (1) "We further find that the murder was wilful, deliberate and premeditated"; (2) "We further find that the murder was intentional"; (3) "We further find that the defendant Fernando Belmontes, Jr., personally committed the killing"; and (4) "We further find that the killing occurred as a result of the commission or attempted commission of the crime of burglary." Two additional special findings were found true in connection with special circumstance: "We further find that the defendant, Fernando Belmontes, Jr., is the actual killer," and "We further find that the defendant, Fernando Belmontes, Jr., in the commission of the special circumstance had the specific intent that death occur."[16]

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15. Defendant has conceded that he "fail[ed] to make an affirmative declaration of withdrawal from the conspiracy agreement."

16. The only special finding left undated and unsigned by the jury foreman was: "We further find that the defendant, Fernando

Defendant argues that these findings were unauthorized "special verdicts" within the meaning of section 1150 and thus violative of his due process rights. (See fn. 17.) We have recently rejected identical arguments and approved the use of "special findings" at the guilt phase such as were made here. (*People* v. *Miranda* (1987) 44 Cal.3d 57, 89-90 [241 Cal.Rptr. 594, 744 P.2d 1127]; *People* v. *Burgener* (1986) 41 Cal.3d 505, 536-538 [224 Cal.Rptr. 112, 714 P.2d 1251]; *People* v. *Davenport* (1986) 41 Cal.3d 247, 273-275 [221 Cal.Rptr. 794, 710 P.2d 861]; *People* v. *Phillips* (1985) 41 Cal.3d 29, 59 [222 Cal.Rptr. 127, 711 P.2d 423].)[17] Moreover, in contrast to Burgener, here the jury was explicitly instructed in connection with the special findings that they could only be found true unanimously and beyond a

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Belmontes, Jr., intentionally aided, abetted, or assisted in the killing itself and in the commission of murder of the first degree."

The Attorney General argues that its rejection "is most reasonable in light of all the other special findings which negate any findings of guilt under the aider and abettor theory." Defendant counters that such inference cannot be drawn because the jury was instructed on a conspiracy — not aider-abettor — theory of vicarious liability. In light of the other explicit special findings which were found true, we need place no reliance on the jury's failure to make the special finding on aider-abettor liability in reaching our conclusion that defendant was found to be the actual, intentional killer.

17. The utility of such special findings may depend upon which or how many special circumstances are charged. For example, where there is "more than one special circumstance ... charged, but a unanimous finding of guilt on one of them is required before the offense becomes a capital crime, particularized verdicts on each special circumstance are essential." (*People* v. *Davenport, supra*, 41 Cal.3d at pp. 274-275.) We emphasize, however, that section 190.4, subdivision (a), does not *require* "special findings" beyond "what the statutory language calls for: a finding of the truth or lack of *truth* of each circumstance, not the facts upon which the finding is based." (*Id.*, at p. 275; cf. *People* v. *Ghent, supra*, 43 Cal.3d at pp. 762-763 [1977 death penalty law].)

reasonable doubt.

Nor is there any merit to defendant's claim that the special finding of premeditation and deliberation is factually unsupported. Defendant's admitted acts of arming himself with the iron bar, following McConnell to the front door when Bolanos and Vasquez were heard driving up, and striking her in the head with the bar with as much force as he could muster in a "back-handed sweeping motion," alone support the jury's finding of premeditation and deliberation beyond a reasonable doubt. (See *People* v. *Anderson* (1968) 70 Cal.2d 15 [73 Cal.Rptr. 550, 447 P.2d 942].)

Lastly, we reject out of hand defendant's further arguments that the special findings were "unreliable, ambiguous, and meaningless surplusage," and that defense counsel had no "notice of" their "potential legal significance" or "opportunity to contest their factual basis." The charges and special circumstance alleged in the information, as well as the record of proceedings on pretrial motions and the prosecutor's opening statement, all belie these assertions. Defendant's own extrajudicial admissions that he armed himself before entering McConnell's residence, personally felled her with a blow from the iron bar, and completed the burglary and fencing of the stereo, surely put counsel on notice of the independent viability of the People's premeditated-murder *and* felony-murder theories of guilt.

11. *Refusal to Instruct on Lesser-related Offenses and Aider-abettor Liability*

In reliance on our opinion in *People* v. *Geiger* (1984) 35 Cal.3d 510 [199 Cal.Rptr. 45, 674 P.2d 1303, 50 A.L.R.4th 1055], defendant contends it was error to refuse his requested instructions on the *lesser-related* offenses of

assault with a deadly weapon, battery, and simple theft. Recognizing that we expressly declared the rule in Geiger to be prospective only (*id.*, at p. 532, fn. 13), he nevertheless urges "that a narrow exception of retroactivity should be carved for capital appellants." We decline the invitation. We explained in *Geiger* that "the purpose of instructing on related offenses is primarily prophylactic ...." (*Ibid.*) Moreover, these facts do not support the possibility that the jury would have convicted defendant of the lesser-related offenses under the refused instructions.

We further reject defendant's claim that it was prejudicial error to refuse his requested instructions on aider-abettor liability. (CALJIC Nos. 3.00-3.02.) The court refused to so instruct the jury because the People had elected to proceed on an uncharged conspiracy theory of vicarious liability. Belmontes's hollow defense would have fared no better under aider-abettor instructions. Under conspiracy law the People had a higher burden of proof; having to establish specific intent to conspire and commit the burglary, as well as completion of overt acts in furtherance thereof. Moreover, in order to withdraw from the planned burglary as an aider-abettor, defendant would have had to have notified his accomplices *and further* done everything in his power to prevent commission of the crime. (CALJIC No. 3.02.) In contrast, to withdraw from a conspiracy, one need only make an affirmative repudiation communicated to his coconspirators. (CALJIC No. 6.20.) Defendant proferred no facts suggestive of his "withdrawal" under either theory. In any case, given the evidence and special findings made by the jury, any error in refusing the requested aider-abettor instructions was necessarily harmless.

C. SPECIAL CIRCUMSTANCE ISSUES

1. *Carlos Error*

Defendant urges that we strike the special circumstance under authority of *Carlos* v. *Superior Court* (1983) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 862], wherein we held that intent to kill is an element of the felony-murder special circumstance of the 1978 death penalty law, whether applied to accomplices or to actual killers. (*Id.*, at pp. 153-154.) His contention must be rejected.

The United States Supreme Court has made clear that felony murderers who personally killed may properly be subject to the death penalty in conformance with the Eighth Amendment — after proper consideration of aggravating and mitigating circumstances — even where no intent to kill is shown. (*Cabana* v. *Bullock* (1986) 474 U.S. 376, 386-387 [88 L.Ed.2d 704, 716-717, 106 S.Ct. 689, 697]; see *Tison* v. *Arizona* (1987) 481 U.S. 137, 152 [95 L.Ed.2d 127, 141, 107 S.Ct. 1676, 1685].) Subsequently, "[i]n *People* v. *Anderson* [(1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306]], we held that with respect to the actual killer, the court need not instruct on intent to kill in connection with felony-murder special circumstances. Such an instruction is required only when there is evidence from which the jury could find that the defendant was an accomplice rather than the actual killer." (*People* v. *Gates* (1987) 43 Cal.3d 1168, 1193 [240 Cal.Rptr. 666, 743 P.2d 301].)

Here the jury made express findings that defendant *personally* committed an intentional, wilful, deliberate, premeditated murder; that the killing was the result of the commission or attempted commission of the burglary; and that defendant was the *actual killer* and had harbored specific intent to kill. We have rejected the several grounds upon which defendant urges that these

special findings were procedurally defective. (*Ante*, at pp. 793-794.) The evidence supports the jury's findings beyond a reasonable doubt that defendant *personally* and *intentionally* killed McConnell — and its rejection of his claim that Vasquez was in the house at the time and "must have" killed her while he (defendant) was busy ransacking the house.[18]

2. *Construing the Felony-murder Special Circumstance as Limited to Premeditated and Deliberate Murders*

Defendant urges us to construe the felony-murder special circumstance (§ 190.2, subd. (a)(17)) as limited to *premeditated* and *deliberate* intentional murders. Such was the requirement under the former 1977 death penalty legislation. (*Carlos, supra*, 35 Cal.3d at pp. 138-143.) In *Carlos* we recognized that "[t]he 1978 initiative repealed provisions of the 1977 act requiring physical presence and a wilful, deliberate, and premeditated killing before the jury could find a felony-murder special circumstance." (*Id.*, at p. 143.) The United States Supreme Court has since made it clear that the Eighth Amendment too does not compel such limitations upon death-qualifying felony murders. (*Cabana* v. *Bullock, supra*, 474 U.S. at pp. 386-387 [88 L.Ed.2d at pp. 716-717, 106 S.Ct. at p. 697]; see *Tison* v. *Arizona, supra*, 481 U.S. at p. 152 [95

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18. In any event, in anticipation of our former Carlos holding, the trial court modified CALJIC No. 8.80, instructing the jury that: "If the defendant was not the actual killer, it must be proved beyond a reasonable doubt that he intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer in the killing itself and in the commission of the murder in the first degree before you are permitted to find the alleged special circumstance of that first degree murder to be true as to Mr. Belmontes." Thus, even had the proposed special findings not been made by the jury — under the modified instruction — defendant was clearly found to have acted with specific intent to kill.

L.Ed.2d at p. 141, 107 S.Ct. at p. 1685].)

3. *Corroboration of Accomplice Testimony to Prove Special Circumstance*

Defendant renews his assertion that the only evidence of his intent to kill came from the uncorroborated accomplice testimony of Bolanos. He argues such as a separate ground for reversal of the special circumstance finding.

Section 190.4, subdivision (a), provides in relevant part that: "Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime." We have already rejected defendant's claims that Bolanos's testimony was the sole source of evidence of defendant's intent to kill, and that Bolanos's testimony in this regard went uncorroborated. (*Ante*, at p. 782.) By parity of reasoning we find the instant claim to be without merit. (Cf. *People* v. *McDonald* (1984) 37 Cal.3d 351, 378 [208 Cal.Rptr. 236, 690 P.2d 709, 46 A.L.R.4th 1011] [construing § 190.4 in the context of double jeopardy principles]; *People* v. *Mattson* (1984) 37 Cal.3d 85, 93-94 [207 Cal.Rptr. 278, 688 P.2d 887] [construing § 190.4 in the context of the corpus delicti requirement].)

II. PENALTY PHASE

A. FACTS

Evidence in Aggravation

At the penalty phase the prosecutor introduced evidence of (1) defendant's acquisition of a handgun in early 1979; (2) defendant's carrying the gun for protection

during the same time period; (3) his April 1979 conviction as an accessory to voluntary manslaughter; (4) a domestic aggravated assault and battery during the month preceding McConnell's murder; (5) an altercation occurring while defendant was a ward in a county youth facility; and (6) autopsy photographs depicting the nature and extent of McConnell's fatal injuries.

Acquisition of the Handgun

In early 1979, William Cartwright managed a motel in Ontario, California, and was casually acquainted with defendant. He testified regarding an occasion when one "Rudy" met defendant at the motel and attempted to sell him a .32 caliber automatic handgun which he had acquired in a burglary. Rudy handed the loaded weapon to defendant and asked if he wanted to buy it. Defendant cocked the trigger, pointed it at Rudy and replied: "I've got it now. Why buy it?" Rudy left the premises and defendant retained the weapon.

Evidence of Defendant's Carrying the Gun for Protection

Steven Cartwright testified he was acquainted with defendant in February 1979. He recalled a discussion with defendant who alluded to the fact that some people were "upset" with him. As defendant said this he indicated he had a gun in his belt, slapped his side, and stated he was not concerned as he had all the protection he needed.

Prior Conviction as an Accessory to Voluntary Manslaughter

The prosecution and defense stipulated that on April 16, 1979, in San Bernardino County Municipal Court, defendant entered a plea of no contest to a charge of being an accessory after the fact to voluntary manslaughter (§§

32, 192, subd. (1)), a felony, and was thereafter sentenced after preparation of a probation report.

Altercation in Youth Facility

In May 1979, defendant was a ward under the supervision of group counselor Ron Cutler. Cutler testified regarding an incident when defendant was observed swinging a chair and about to hit another ward. Cutler was able to knock the chair out of defendant's hands in mid-air before he could strike the other youth with it.

Domestic Aggravated Assault and Battery

In February 1981, defendant, Barbara Murillo (then four months pregnant with defendant's second child), and their two-year-old daughter were living in an apartment in Lodi rented for them by Murillo's parents. Murillo testified for the People regarding an incident that occurred when Bolanos, Cobarrubio, and others were visiting at the apartment. Murillo and defendant got into an argument which escalated into an altercation. Murillo grabbed a "file" for protection and attempted to phone the police. Defendant cut the telephone cord with his knife. Murillo tried to get out of the apartment. Defendant pushed her and hit her on the head; at one point causing her to drop their infant daughter. He shoved Murillo to the ground and choked her; others present managed to temporarily thwart the attack. Murillo broke out a window and tried to escape through it. Defendant, with the assistance of another male, caught up with and dragged or carried her back into the apartment. A neighbor finally summoned the police who arrived as defendant was leaving the premises.

Evidence in Mitigation

Defendant was one month shy of age 20 at the time of McConnell's murder. His mother testified that her marriage to his father was an unhappy one. He was an alcoholic prone to violence and would beat her; breaking her arm on one occasion, stabbing her in another incident. Defendant was 10 years old when the marriage broke up. Mrs. Belmontes remarried; she testified defendant's stepfather was strict and defendant became difficult to control when the second marriage ended after five years. Defendant had not lived with his mother since being committed to the California Youth Authority in 1979. At the time of trial defendant had a younger brother and sister. Ms. Belmontes characterized defendant's relationship with his sister as "very close."

Defendant's grandfather testified that he and his wife were close to defendant, who attended his grandmother's funeral in 1978. He confirmed that defendant's natural father drank to excess and beat his daughter (defendant's mother). The grandfather had no contact with defendant after his release from the Youth Authority.

Robert Martinez, age 24, testified on defendant's behalf. They were close friends during their early teens and usually spent their time working on Martinez's "low rider" automobile, smoking marijuana and drinking beer, and "hanging around" a car club. Defendant was "best man" at Martinez's wedding. Martinez felt defendant was not a violent person. He and his wife had no contact with defendant after his one visit with them shortly after his release from the Youth Authority.

Martinez's wife Darlene testified she considered defendant a close friend. She was a born-again Christian; when defendant visited with them after his release from the Youth Authority he had advised her that he too was a born-again Christian. He also mentioned his struggling

relationship with Murillo and expressed concern that she was not a Christian.

Reverend Dale Barrett, chaplain at the California Youth Authority's Pine Grove Facility, knew defendant from his participation in the "M-2" program, under which a member-family of a local church would be matched with a ward, who in turn would be permitted to visit with the family at specified times. Defendant was matched with Beverly and Fred Haro and participated in the program for about a year. Defendant was baptized during his stay in the Youth Authority. Reverend Barrett felt that unlike the many wards who stayed in the program only to get out of camp and manipulate favors from the sponsoring families, defendant had not "conned" them. He testified that although he personally believed in the death penalty as a deterrent to premeditated murders, he did not feel defendant deserved to die because he was a salvageable person with extenuating circumstances in his life. Although his knowledge of defendant's crimes was concededly limited, it was his understanding that they had not been conclusively determined as premeditated.

The Haros testified they were members of Reverend Barrett's church. Through participation in the "M-2" program defendant had spent Wednesday evenings and weekends with them over a period of time. The Haros also sponsored other wards whom they treated as their own sons. They felt they had a good relationship with defendant, who on occasion had attended church with them. They felt defendant had been a good influence on their own teenage son. Fred Haro testified he was "strongly for the death penalty" but believed defendant was innocent of the charges and thus did not deserve to die. Beverly Haro felt Barbara Murillo was the primary negative factor in defendant's life.

Don Miller, assistant chaplain at the Youth Authority's Preston Facility and director of the "M-2" program, helped place defendant in a halfway house in Oakland upon his release from the Youth Authority. He was aware that defendant stayed in that facility only two weeks before moving to the Lodi area to take a job with the forest service. Defendant returned to Preston on a few occasions after his release and spoke to wards about what life was like "on the outside." Reverend Miller believed defendant would be good at talking with other prisoners if he were committed to prison for a life term.

Defendant testified in his own behalf. He had a poor relationship with his father who would come home drunk and hit his mother. He did not like school and stopped attending in the ninth grade. Although his youth was "pretty hard," defendant twice stressed he did not want to "use it as a crutch."

Defendant was in the custody of the Youth Authority from early 1979 through his release in November 1980. He worked on the fire crew at the Pine Grove Camp for one year. He admitted he initially entered the "M-2" program as a way to get out of camp. Thereafter, he studied the Bible with the Haros and in time started serving the Lord. He was paroled from the Youth Authority after serving his maximum sentence. He stayed at the halfway house in Oakland for two weeks and then went to Southern California for a short period, returning with Murillo to the Lodi area to take a job with the forest service. Things did not go well for defendant while he was living with Murillo. He "couldn't deal with" his religious commitment and "started going back to [his] old ways," in part due to "pressure on the streets." At the time of trial, defendant had not abandoned his religious beliefs but felt he was no longer "dedicated one hundred percent" to his religious commitment.

At the conclusion of the evidentiary stage, the court permitted defendant to personally address the jury in his own behalf during closing arguments.

B. PENALTY PHASE ISSUES

1. *Use of Peremptory Challenges to Exclude Prospective Jurors Expressing Reservations About the Death Penalty*

Defendant contends that the prosecutor improperly exercised peremptory challenges to excuse four prospective jurors who — although not excusable for cause under *Witherspoon* v. *Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770] — nevertheless expressed some reservations about the death penalty. We have rejected the argument in *People* v. *Turner* (1984) 37 Cal.3d 302 [208 Cal.Rptr. 196, 690 P.2d 669], wherein we found "no ... constitutional infirmity in permitting peremptory challenges by both sides on the basis of specific juror attitudes on the death penalty." (*Id.*, at p. 315.)

2. *Instructions on Sympathy and General Character and Background Evidence*

(31) Defendant argues that the jury was misinstructed on the proper role of sympathy and general character and background evidence in the penalty phase.

In *People* v. *Melton* (1988) 44 Cal.3d 713, 759 [244 Cal.Rptr. 867, 750 P.2d 741], we explained: "We previously reversed several death judgments where (1) a 'no-sympathy' instruction was given *at the penalty phase*, (2) the jury also received, without elaboration, an

instruction (the 'unadorned factor (k) instruction') to consider mitigating evidence which 'extenuates the *gravity of the [capital] crime*' (§ 190.3, subd. (k); former § 190.3, subd. (j); CALJIC, former No. 8.84.1, subd. (k), italics added), and (3) defendant introduced substantial evidence about his *general character and background*. In such cases, we reasoned, there was intolerable ambiguity about whether the jury understood its power and duty under the Eighth Amendment to consider all 'sympathetic' evidence defendant proffered on behalf of a penalty less than death. (E.g., *People* v. *Brown* (1985) 40 Cal.3d 512, 537-538 [220 Cal.Rptr. 637, 709 P.2d 440]; *People* v. *Lanphear* (1984) 36 Cal.3d 163, 166-169 [203 Cal.Rptr. 122, 680 P.2d 1081]; *People* v. *Easley* (1983) 34 Cal.3d 858, 878-879 [196 Cal.Rptr. 309, 671 P.2d 813]; see *Eddings* v. *Oklahoma* (1982) 455 U.S. 104, 117 [71 L.Ed.2d 1, 12, 102 S.Ct. 869], and conc. opn. of O'Connor, J., at p. 119.)[19]

"The United States Supreme Court granted certiorari in *People* v. *Brown, supra*, 40 Cal.3d 512, to consider the constitutional effect of a 'no-sympathy' admonition on penalty deliberations in a capital case. The court has concluded that a warning to ignore 'mere' sympathy does not offend the Eighth Amendment in and of itself. However, where the jury was cautioned against sympathy and also received an unadorned factor (k) instruction, the penalty-phase instructions and arguments must be examined as a whole to determine whether the jury was 'adequately informed ... of its responsibility to consider all of the mitigating evidence introduced by the [defendant]

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19. In a footnote we explained: "CALJIC No. 8.84.1 has since been revised to make clear, as we directed in Easley, that mitigating evidence to be considered under 'factor (k)' includes 'any ... "aspect of [the] defendant's character or record ... that the defendant proffers as a basis for a sentence less than death." ...' (P. 878, fn. 10; see CALJIC No. 8.84.1, subd. (k) (4th ed. 1984 rev.).)"

...." (*California* v. *Brown* (1987) 479 U.S. 538, 546 [93 L.Ed.2d 934, 943, 107 S.Ct. 837] [conc. opn. of O'Connor, J.].)"

We conclude the jury here was adequately informed of the full nature of its responsibility to consider sympathy and general character and background evidence.

First, the standardized "no-sympathy" instruction was not given in this case. At the People's request, a modified version of CALJIC No. 1.00 was given. The words "sympathy" and "passion" were omitted from the first sentence of the instruction, which as modified read: "You are instructed that as jurors you must not be swayed by mere sentiment, conjecture, [] ... prejudice, public opinion, or public feeling." (Contrast CALJIC No. 1.00.) The following charge was then read after the first modified sentence: "Also, you must not be influenced by sympathy or passion except as those feelings properly arise out of your consideration of the proven factors in aggravation and mitigation." Thus the trial judge and prosecutor here presciently fashioned an instruction which satisfies the directives announced by the United States Supreme Court nearly five years later in *California* v. *Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837].[20/]

Next, although the jury did receive an instruction in the literal terms of factor (k), it was also instructed that only

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20. Defendant contends that the modified instruction was itself incorrect and misleading because sympathy for the defendant cannot "properly arise" out of an aggravating factor. In so arguing, however, he interprets the proper role of "sympathy" at the penalty phase too narrowly. The United States Supreme Court has implicitly recognized that a penalty phase juror need not "ignore emotional responses" which are "rooted in the aggravating and militating evidence introduced during the penalty phase." (*California* v. *Brown* (1987) 479 U.S. 538, 542 [93 L.Ed.2d 934, 940, 107 S.Ct. 837].)

statutory aggravating factors could be properly considered (§ 190.3), immediately followed by a special instruction which stated: "the mitigating circumstances which I have read for your consideration are given to you *merely as examples* of some of the factors that you may take into account as reasons for deciding not to impose a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them, standing alone, may support a decision that death is not the appropriate punishment in this case [italics added]."

The prosecutor's argument reinforces our conclusion that, as instructed, the jury must have fully understood its obligation to weigh all of defendant's mitigating evidence. He told the jurors: "With respect to the instructions ... in this listing of aggravating and mitigating circumstances which you are to weigh one against the other, there is a proper place for sympathy and passion. [¶] ... At this stage of the proceedings you are not only the judges of the facts, you decide how much they weigh. And in weighing them, it is proper to take into account factors that impinge upon anger and sympathy and so forth." He went on to explain: "Let me tell you what that doesn't mean, if I may. Your regard for Steacy McConnell's family, mean no one [sic], no one can deny sympathy for them, no one. But that is not the kind of sympathy the instruction tells you to consider. It says as sympathy or passion naturally arises or properly arises from the factors in aggravation and mitigation. ... [¶] ... it is different from the guilt phase when sympathy was to play no part at all."

In discussing the scope of "factor (k)" evidence in his argument, the prosecutor did at first express some doubt as to whether evidence of defendant's prior religious experience "really fits in there." However, he quickly concluded: "I think it appears to be a proper subject of

consideration." He then argued his position that defendant's religious experience *prior to the murder* was not a strong mitigating factor under all the circumstances. He suggested the jury should "weigh" defendant's "religious awakening" as "a basis for determining penalty," particularly in the context of Reverend Miller's opinion that, if given a life term, defendant would be good at talking and working with other prisoners. The prosecutor concluded in this vein: "I think that value to the community is something that you have to weigh in. There's something to that."

Finally, in summing up all the penalty phase evidence, the prosecutor candidly stated: "The prior criminal activity has been described to you on the stand isn't great, you know. [¶] All right. So these things, they really, they don't show that the defendant is such a horrible person that the ultimate penalty must be imposed." The prosecutor went so far as to suggest that the aggravating factors — other than those circumstances directly related to the murder — came to a "draw." The thrust of his penalty phase argument was that the aggravated circumstances of the crime itself were the major factors outweighing the mitigating evidence and militating in favor of the death penalty.

Viewing the instructions and arguments as a whole, we conclude there exists "no legitimate basis" for believing the jury was misled regarding its sentencing responsibilities. (*California* v. *Brown, supra*, 479 U.S. at p. 546 [93 L.Ed.2d at p. 943, 107 S.Ct. at p. 842] [conc. opn. of O'Connor, J.].)

3. "*Mandatory*" *Nature of 1978 Death Penalty Law*

Defendant attacks the instruction which charged the jury that it "shall" impose death if it finds that

aggravating "outweigh" mitigating circumstances. (CALJIC, former No. 8.84.2; see § 190.3.)

We recently summarized the relevant principles in *People* v. *Gates, supra*, 43 Cal.3d at pages 1203-1204 as follows: "In *People* v. *Brown* (1985) 40 Cal.3d 512, 538-545 (revd. on other grounds *California* v. *Brown* (1987) U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]), we concluded that the directive of section 190.3 that the trier of fact 'shall impose a sentence of death' if it 'concluded that the aggravating circumstances outweigh the mitigating circumstances,' did not impermissibly restrict the jury's constitutional sentencing discretion. We rejected the defendant's proffered mechanistic construction of the words 'outweigh' and 'shall' in favor of one which directed the jury to weigh the various factors and determine under the relevant evidence which penalty is appropriate in a particular case. We noted, however, that the statutory language — particularly the words 'shall impose' — left room for some confusion about the jury's role and therefore directed courts in the future to instruct on the scope of the jury's discretion. We further stated that each prior case 'must be examined on its own merits to determine whether, in context, the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion under the 1978 law.' (*Id.*, at p. 544, fn. 17.)

"Our concerns in *Brown* were essentially two: The first was that the jury might be confused about the nature of the weighing process, that it is not a mere mechanical counting of factors on each side of an imaginary scale but rather a mental balancing process. Our second concern was that use of the word 'shall' might mislead the jury as to the substance of the ultimate determination it was called upon to make. In *Brown*, we concluded that the statutory language 'should not be understood to require

any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.' (40 Cal.3d at p. 541.)" (See also *People* v. *Allen* (1986) 42 Cal.3d 1222, 1276-1277 [232 Cal.Rptr. 849, 729 P.2d 115].)

We have examined the instructions and arguments in this regard and determine that, overall, the jury was adequately informed of the full nature of its sentencing responsibility. (*People* v. *Brown, supra*, 40 Cal.3d at p. 544, fn. 17.) While it heard the "shall/outweigh" instruction, the jury also received additional instructions further defining its proper sentencing function. It was told that aggravating factors were strictly limited by statute and must be proved beyond a reasonable doubt. As already noted, it was further told that the mitigating factors enumerated in the statute were merely "examples" of mitigating circumstances which could be considered, and that any one mitigating circumstance *standing alone* could support a decision that death is not the appropriate penalty in this case.

Regarding counsel's arguments, here, as in *Allen*, "the prosecutor not once suggested the weighing process was a mechanical function. Indeed, he effectively told the jury just the opposite, and attempted to give guidelines that could be applied by each individual juror to first value and then weigh the respective factors." (*People* v. *Allen, supra*, 42 Cal.3d at p. 1277.) He told the jury they must "weigh" aggravating against mitigating circumstances in determining penalty, and explained: "[Y]ou decide how much they weigh." He used the terms "weigh," "simple weighing," and "balance" several times in his discussions

of each of the individual aggravating and mitigating circumstances. He urged the jury to assess defendant's prior religious experience and attempt to determine "how much does that weigh." He stated that defendant's potential value to the community or prison population should he be sentenced to life imprisonment was "something you have to weigh in." He stressed to the jurors that defendant's obvious intelligence was "a factor to be weighed," as was any lingering doubt about his guilt of McConnell's murder.

As already noted, the prosecutor suggested that the aggravating circumstances — exclusive of those directly related to the brutal murder — did not in and of themselves warrant the death penalty. Our review of the instructions and arguments as a whole compels rejection of defendant's assertion that the giving of the "shall/weigh" instruction "misled the jury into abandoning its role as conscience of the community and assuming a role more akin to that of a penological account," "governed by the type of 'arithmetical formula' condemned in [*Brown, supra*, 40 Cal.3d 512]."

Lastly, defendant refers us specifically to one juror's (Juror Hearn's) inquiry about "the listing" of aggravating and mitigating circumstances. She asked, "That was the listing, right?" and then inquired: "Of those certain factors we were to decide one or the other and then balance the sheet?" The court responded: "That is right. It is a balancing process."

At oral argument, appellate counsel asserted that these inquiries reflect that "Mrs. Hearn was seeking judicial confirmation of her restrictive view of the scope of factors which should go into the penalty phase deliberations." We cannot agree with counsel's conclusion that the juror's mere reference to the statutory "listing" of aggravating

and mitigating factors — as a predicate to her question about the balancing process — reflected her "restrictive" view of factor (k) evidence. Nor can we agree that "the court compounded the error in its response, 'That was the listing, yes.'" Counsel suggests that the "constitutionally correct" answer would have been: "That list is exhausting [*sic*] as to aggravating factors, but it is only illustrative as to mitigating factors." That is precisely what the court's modified instructions on mitigating evidence conveyed. (*Ante*, at pp. 800-801.)

Defendant also infers from Juror Hearn's use of the term "balance the sheet" in her inquiry that she was following the type of "arithmetical formula" which this court condemned in *Brown, supra*, 40 Cal.3d 512. But viewed in the overall context of the instructions and arguments, neither the juror's question nor the court's response supports an inference of reversible *Brown* error. Defendant misreads our statement in *Brown* — to the effect that in weighing mitigating against aggravating circumstances "the balance is not between good and bad but between life and death" (*id.* at p. 542, fn. 13) — as a blanket condemnation of use of the term "balancing" to describe the "weighing" process. Elsewhere in *Brown* we characterized the term "weighing" as "connot[ing] a mental balancing process. ..." (*Id.*, at p. 541.) There is nothing inherently misleading in use of the term "balancing" to describe the weighing process — where the instructions and arguments taken as a whole fully and properly define the scope and nature of the jury's sentencing responsibilities.[21]

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21. The verb "balance" is defined thusly: "1. To weigh in a balance; to estimate the weight of; to ponder; 2. To weigh (two things) by each other; to compare in relative force, importance, value, etc. ..." (Webster's New Internat. Dict. (2d ed. 1936) at p. 206.)

4. *Requiring Appropriateness of Death Penalty to Be Shown Beyond a Reasonable Doubt*

Defendant asserts that the 1978 death penalty law is unconstitutional in that it fails to require the jury to find *beyond a reasonable doubt* (1) that the aggravating factors outweigh those in mitigation, and (2) that death is the appropriate penalty. We have recently rejected these identical arguments. (*People* v. *Melton, supra*, 44 Cal.3d at pp. 762-763; *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 777-779 [230 Cal.Rptr. 667, 726 P.2d 113]; *People* v. *Allen, supra*, 42 Cal.3d at p. 1285.)

5. *Specific Findings on Aggravating and Mitigating Circumstances at the Penalty Phase*

Defendant argues that the court erred in denying defense counsel's request that the jury be required to make specific findings regarding any aggravating or mitigating factors found to be true. We have recently rejected this argument; written findings disclosing the precise reasons for the jury's penalty verdict are not required. (*People* v. *Rodriguez, supra*, 42 Cal.3d at pp. 777-779; *People* v. *Allen, supra*, 42 Cal.3d at p. 1285; cf. *People v. Frierson* (1979) 25 Cal.3d 142, 178-180 [158 Cal.Rptr. 281, 599 P.2d 587] [1977 death penalty law]; *Harris v. Pulley* (9th Cir. 1982) 692 F.2d 1189, 1195-1196, vacated and remanded on other grounds, *Pulley v. Harris* (1984) 465 U.S. 37 [79 L.Ed.2d 29, 104 S.Ct. 871].)

6. *Age as an Aggravating Factor*

One of the factors to be considered by the penalty phase jury "if relevant" is "[t]he age of the defendant at the time of the crime." (§ 190.3, factor (i).) The prosecutor here told the jury it was for them to determine whether defendant's age was a factor in aggravation or mitigation.

He went on to argue: "The defendant may well say I was only 19 when this happened or the attorney may say he was only 19 and when you're young you sometimes you make mistakes, mistakes that you would never make if you were 29 or 39. And that sort of thing must be taken into account. When you are young, your judgment isn't right or isn't mature or developed. [¶] On the other hand, however, it's common experience that when you're young people are idealistic, altruistic, they believe that anything is possible, that people love one another or that everything is good or all is good for them and that as they age, a cynicism creeps in. Maybe that's too strong a word. A hardening, maybe. And that it doesn't always necessarily mean that you're a better person when you get older. [¶] Going the other way around, it doesn't mean you're a better person when you're younger, either. [¶] All I'm saying is that I think the age of the defendant goes both ways, really." In further commenting on defendant's own testimony that he was not relying on his difficult childhood to justify his criminal acts, the prosecutor stated: "But he's old enough that he has to take responsibility for his own actions, and he told you that. He can't use that as a crutch. I give him credit for recognizing that."

Defendant asserts that this was improper argument on age as an aggravating factor. Initially, we note that defendant failed to object to the prosecutor's comments or to request an appropriate admonition. Accordingly, to the extent he is arguing "misconduct," he has waived the objection on this ground on appeal. (*People* v. *Rodriguez, supra*, 42 Cal.3d at p. 788; *People* v. *Allen, supra*, 42 Cal.3d at pp. 1283-1284; *People* v. *Green, supra*, 27 Cal.3d at p. 27.)

We recently stated that "mere chronological age, a factor over which one can exercise no control, should not

of itself be deemed an aggravating factor." (*People* v. *Rodriguez, supra*, 42 Cal.3d p. 789.) On the other hand, "mere chronological age of itself should not be deemed a mitigating factor. Age alone is plainly 'a factor over which one can exercise no control.' (*Rodriguez, supra*, at p. 789) .... [¶] In our view, the word 'age' in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case." (*People* v. *Lucky* (1988) 45 Cal.3d 259, 302.)

Here the prosecutor in essence argued that defendant's age was a "neutral" factor: "All I'm saying is that I think the age of the defendant goes both ways, really." He did not declare affirmatively that defendant's "mere chronological age" of almost 20 years weighed in favor of the death penalty. (*Rodriguez, supra*, 42 Cal.3d at p. 789.) He remarked that defendant was "old enough that he has to take responsibility for his own actions." Such comment "reasonably may be viewed as merely arguing the inapplicability of a mitigating factor, rather than seeking to penalize defendant by reason of his age." (*People* v. *Ghent, supra*, 43 Cal.3d at p. 775.)

7. *Lack of Remorse as an Aggravating Factor*

Defendant contends that the prosecutor impermissibly argued lack of remorse as an aggravating factor. The prosecutor told the jury: "[Defendant] can't suggest to you he feels remorse, because ladies and gentlemen of the jury, that is the one thing that we have never heard, that he is sorry. As a matter of fact, the only emotion, the only genuine emotion that I saw, and I think you saw, came during his cross-examination on the guilt phase when he expressed anger at Domingo Vasquez for standing and

staring in shock instead of picking up the stereo. So there is no remorse. No thought of Steacy."

It is clear that the People may not present evidence in aggravation unless it is relevant to an aggravating circumstance expressly listed in section 190.3 (*People* v. *Boyd* (1985) 38 Cal.3d 762, 771-776 [215 Cal.Rptr. 1, 700 P.2d 782].)

Defendant failed to object to the prosecutor's comments on remorse. Nor did he request a curative admonition. To the extent he is claiming it was "misconduct" to affirmatively argue lack of remorse as an aggravating factor, he has waived the objection on appeal. (*People* v. *Rodriguez, supra*, 42 Cal.3d at p. 788; *People* v. *Allen, supra*, 42 Cal.3d at pp. 1283-1284; *People* v. *Green, supra*, 27 Cal.3d at p. 27.)

"[W]e have held that, under a prior death penalty law, the presence or absence of remorse is a factor relevant to the jury's penalty decision. (*People* v. *Coleman* [(1969)] 71 Cal.2d [1159'], at p. 1168 [80 Cal.Rptr. 920, 459 P.2d 248].) The concept of remorse for past offenses as a mitigating factor sometimes warranting less severe punishment or condemnation is universal." (*People* v. *Ghent, supra*, 43 Cal.3d at p. 771.)

Although in *Davenport* we held that "in the future" prosecutors should refrain from arguing the mere absence of a mitigating factor as itself constituting an aggravating circumstance (41 Cal.3d at p. 289), here the prosecutor's reference to defendant's lack of remorse, "as in his comments on age ... did no more than suggest the *inapplicability* of a *mitigating* factor." (*People* v. *Rodriguez, supra*, 42 Cal.3d at p. 790; *People* v. *Ghent, supra*, 43 Cal.3d at p. 771.) It was part-and-parcel of his overall argument that each category of defendant's

penalty phase evidence (e.g., defendant's "religious beliefs" within the "catchall provision" of factor (k)) was worthy of assignment of only marginal mitigating "weight."

Lastly, even were we to read the prosecutor's closing argument as affirmatively advancing defendant's lack of remorse as an aggravating circumstance, our review of the record convinces us that such remarks could not have affected the jury's penalty verdict. (*People* v. *Ghent, supra* 43 Cal.3d at pp. 775-776.)

8. *Evidence of Other Criminal Conduct*

Defendant argues that the admission of prior *unadjudicated* criminal conduct at the penalty phase violated his state and federal due process rights. The claim lacks merit. Section 190.3 constitutionally permits introduction at the penalty phase of evidence of prior unadjudicated criminal conduct as relevant to and bearing upon the character and record of the individual offender. "As the plurality opinion in *Woodson* v. *North Carolina* (1976) 428 U.S. 280, 304 [49 L.Ed.2d 944, 961, 96 S.Ct. 2978], emphasized: '... [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment [citation] *requires consideration of the character and record of the individual offender* and the circumstances of the particular offense *as a constitutionally indispensable part of the process of inflicting the penalty of death*.' (Italics added.)" (*People* v. *Robertson* (1982) 33 Cal.3d 21, 58 [188 Cal.Rptr. 77, 655 P.2d 279], first italics added; see *Eddings* v. *Oklahoma, supra*, 455 U.S. 104, 111-112 [71 L.Ed.2d 1, 8-9]; *Lockett* v. *Ohio* (1978) 438 U.S. 586, 604-605 [57 L.Ed.2d 973, 989-990, 98 S.Ct. 2954] (plur. opn.); *People* v. *Brown, supra*, 40 Cal.3d at p. 539.)

Defendant further contends that none of his prior instances of unadjudicated criminal conduct constituted

a cognizable criminal offense involving force or violence.

Insofar as section 190.3 contemplates consideration of defendant's criminal history (see factors (b), (c)), such evidence "must be limited to ... conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute. ..." (*People* v. *Phillips*, (1985) 41 Cal.3d 29, 72; see also *Boyd, supra*, 38 Cal.3d at pp. 776-778.) We have also made clear the distinction between "criminal activity" and "convictions" for purposes of section 190.3. "The plain meaning of [factors] (b) and (c) of section 190.3 is that the jury must consider any *violent* criminal activity by the defendant, *whether or not it led to prosecution and conviction* [fn. omitted], and any 'prior *felony conviction*' (italics added), whether the underlying offense was violent or nonviolent. (See ... *Boyd* (1985) 38 Cal.3d 762, 774, 776.) ...." (*People* v. *Balderas* (1985) 41 Cal.3d 144, 201 [222 Cal.Rptr. 184, 711 P.2d 480], second italics added.)

The prosecutor was entitled to present testimonial evidence of violent "criminal activity" with which defendant had never been charged. (*Balderas, supra*, 41 Cal.3d at pp. 201, 205; see also *People* v. *Robertson*, *supra*, 33 Cal.3d at p. 53.) Defendant's domestic altercation with Murillo; his pointing a loaded gun at "Rudy" in order to appropriate the weapon; and his apparently unprovoked act of swinging a chair at another ward at a youth facility, were all violent criminal offenses (aggravated assault, battery, assault with a deadly weapon, and simple assault) and thus properly argued as aggravating circumstances.

It was error, however, to admit evidence that defendant, while in the presence of an acquaintance, once slapped his side indicating he had a handgun in his waistband, while stating he had "all the protection he

needed." Although such is arguably an "express or implied threat to use force or violence" (§ 190.3), it was not directed at a particular victim or victims, and did not amount to criminal conduct in violation of a penal statute. (*People* v. *Phillips, supra*, 41 Cal.3d at p. 72.) The Attorney General concedes as much.

We find the error nonprejudicial. This case was tried before *Phillips, supra,* 41 Cal.3d 29, and *Balderas, supra*, 41 Cal.3d 144, were decided. The jury was instructed on the requirement that "other crimes" be proved beyond a reasonable doubt. (*People* v. *Robertson, supra*, 33 Cal.3d at p. 55.) The properly admitted aggravating evidence in this case — in particular, the circumstances of the crime (§ 190.3, factor (a)) — was simply overwhelming. It would require capricious speculation for us to conclude that the erroneous admission of evidence of the "gun slapping" incident affected the penalty verdict.

Lastly, defendant argues that evidence of his 1979 felony conviction upon a plea of "no contest" to being an accessory to voluntary manslaughter should have been excluded. He asserts that such a plea "demonstrates only that a defendant is willing to accept the punishment prescribed for a particular offense," and "does not establish the truth of the facts implied or contained in the charge." The claim is specious. Section 1016 provides, in pertinent part, that: "The legal effect of [a nolo contendere] plea, to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes." Moreover, defendant *stipulated* to introduction of this evidence. Evidence of the prior felony conviction was properly admitted. (§ 190.3, factor (c).)

9. *Juror Misconduct*

During a break in the penalty phase, defense counsel

advised the court that he had observed a juror, Mr. Meyers, talking to Mr. McConnell, a member of the victim's family. Counsel had also seen one of the four alternate jurors, Ms. Romans, conversing with the victim's grandmother. A hearing was conducted in chambers on the matter. Juror Meyers explained that he was "discussing motorcycles" with Mr. McConnell. The conversation was "purely social;" nothing had been said about defendant or the trial proceedings. Defense counsel asked Meyers: "[D]o you think there is anything about the fact that you have had a chance to be exposed to Mr. McConnell in this social vein or whatever you would have some rapport or feeling with him that would prejudice or be a concern to me or Mr. Belmontes?" Meyers responded, "No." He expressed a clear understanding of the court's concerns. When asked, "Supposing you were to make a decision he [Mr. McConnell] didn't agree with, mainly life in prison, do you feel you could look him in the eye?" Meyers responded, "Sure." He then apologized for causing a problem.

Alternate Juror Romans was similarly questioned. She revealed she had talked briefly with the victim's grandmother, who was hard of hearing, on a "personal" level; "just wondering how she was, you know, holding up or something like that." Since Romans ultimately never sat on defendant's jury, there is no concern that her contact was prejudicial.

The prosecutor informed the court that he had instructed the members of the victim's family "not to talk to the prospective jurors, although that was some time ago." He advised the court that he would do so again. The court denied counsel's motion for a mistrial, stating on the record that having made the relevant inquiries it found "no taint." Back in the full jury's presence, the court admonished the jurors not to talk to any members of the

victim's family, adding: "And I would admonish the McConnell family and the Steacy family also, please, whether you want you to talk about the stars or the tulips or the roses, I don't even want to do that."

Defendant argues that a mistrial should have been granted — or in the alternative — Juror Meyers replaced with an alternate juror other than Ms. Romans. We have held that jury misconduct raises a presumption of prejudice; unless the prosecution rebuts that presumption by proof that no prejudice actually resulted, the defendant is entitled to a new trial. (*People* v. *Pierce* (1979) 24 Cal.3d 199, 207 [155 Cal.Rptr. 657, 595 P.2d 91]; *People* v. *Honeycutt* (1977) 20 Cal.3d 150, 156 [141 Cal.Rptr. 698, 570 P.2d 1050].) Our review of the record satisfies us that the presumption was rebutted and no prejudice actually resulted.

10. *Admissibility of Codefendants' Plea Dispositions as Mitigating Evidence*

Defendant argues that the trial court erred in excluding evidence of the pleas and negotiated dispositions of his accomplices at the penalty phase.[22] We disagree. Evidence of Bolanos's and Vasquez's negotiated plea dispositions — *separate and apart from evidence of their complicity and degree of involvement in the instant offenses* — bore no relevance to the jury's properly guided function at the penalty phase. "'[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of *the character and record of the*

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22. The jury of course learned at the guilt phase — for purposes of impeachment of Bolanos — that he had pled guilty to second degree burglary and was granted immunity from prosecution for McConnell's murder in exchange for his testimony at defendant's trial. Evidence of Vasquez's guilty plea to second degree murder was not admitted at the guilt phase. (*Ante*, fn. 9, at p. 779.)

individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death (italics added).'" (*Lockett* v. *Ohio, supra*, 438 U.S. at p. 604 [57 L.Ed.2d at p. 989.], quoting *Woodson, supra*, 428 U.S. 280.)

The United States Supreme Court in *Lockett* stated: "We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. *The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.* A variety of flexible techniques — probation, parole, work furloughs, to name a few — and various post-conviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence [fn. omitted, italics added]." (*Lockett* v. *Ohio, supra*, 438 U.S. at pp. 604-605 [57 L.Ed.2d at p. 990], italics added; see *People* v. *Allen, supra*, 42 Cal.3d at pp. 1286-1287.)

In *Coulter* v. *State* (Ala.Crim.App.1982) 438 So.2d 336, 345-346, the Alabama Court of Criminal Appeals, "[a]pplying the principles of *Lockett*, in light of *Eddings* [*Eddings* v. *Oklahoma* (1982) 455 U.S. 104 [71 L.Ed.2d 1,

102 S.Ct. 869]] and *Enmund* [*Enmund* v. *Florida* (1982) 458 U.S. 782 [73 L.Ed.2d 1140, 102 S.Ct. 3368]] ...," reasoned that "an alleged accomplice's sentence is a product of the aggravating and mitigating circumstances applicable to the alleged accomplice. *In the sentencing phase of the trial, the fact that an alleged accomplice did not receive the death penalty is no more relevant as a mitigating factor for the defendant than the fact that an alleged accomplice did receive the death penalty would be as an aggravating circumstance against him. Simply put, an alleged accomplice's sentence has no bearing on the defendant's character or record and it is not a circumstance of the offense* (italics added)." (See also *Brogie* v. *State* (Okla. Crim. 1985) 695 P.2d 538, 546-547 [relying on *Coulter*].)

In *State* v. *Williams* (1982) 305 N.C. 656 [292 S.E.2d 243], certiorari denied 459 U.S. 1056 [74 L.Ed.2d 622, 103 S.Ct. 474], defendant argued that the trial court had erred in refusing to submit to the jury as a circumstance in mitigation evidence that his two accomplices had negotiated plea bargains with maximum ten-year prison terms. In rejecting the contention, the North Carolina Supreme Court wrote: "The fact that the defendant's accomplices received a lesser sentence is not an extenuating circumstance. It does not reduce the moral culpability of the killing nor make it less deserving of the penalty of death than other first-degree murders. [Citation.] The accomplices' punishment is not an aspect of the defendant's character or record nor a mitigating circumstance of the particular offense. (See *Lockett* v. *Ohio* [, *supra*,] 438 U.S. 586.) It bears no relevance to these factors, and thus there was no error in the judge's refusal to submit it to the jury." (*Id.*, at pp. 261-262.)

The Fifth Circuit Court of Appeals has likewise rejected the identical contention, concluding that nothing in the

United States Supreme Court's recent decision in *Skipper* v. *South Carolina* (1986) 476 U.S. 1 [90 L.Ed.2d 1, 106 S.Ct. 1669], or *Hitchcock* v. *Dugger* (1987) 481 U.S. 393 [95 L.Ed.2d 347, 107 S.Ct. 1821], lends any support to the argument that a codefendant's sentence disposition is relevant to a capital defendant's character, record, or the circumstances of his offense, as relevancy is defined in *Lockett, supra*, 438 U.S. 586. (*Brodgon* v. *Butler* (5th Cir. 1987) 824 F.2d 338, 343; *Brogdon* v. *Blackburn* (5th Cir. 1986) 790 F.2d 1164, 1169.)

Although we recognize that several Florida decisions have reached a contrary conclusion (see, e.g., *Brookings* v. *State* (Fla. 1986) 495 So.2d 135, 143; *Messer* v. *State* (Fla. 1976) 330 So.2d 137, 141-142), we find the rationale of *Coulter* v. *State, supra*, 438 So.2d 336, *State* v. *Williams supra*, 292 S.E.2d 243, and the *Brogdon* decisions persuasive and conclude that their holdings should be applied here. At the guilt phase, defendant's jury was fully apprised of the roles and degree of participation Bolanos and Vasquez each had in the burglary and murder. The jury's verdicts and special findings, supported by the weight of evidence, establish that defendant was found beyond a reasonable doubt to have personally, intentionally killed McConnell prior to Vasquez's entry into the victim's house. Bolanos never entered the house. As a factual matter, defendant's accomplices clearly did not share his level of involvement and participation in the murder. On these facts, the holdings of *Woodson, supra*, 428 U.S. 280, *Lockett, supra*, 438 U.S. 586, *Eddings, supra*, 455 U.S. 104, and *Enmund, supra*, 458 U.S. 782 compel the conclusion that Bolanos's and Vasquez's individually negotiated dispositions were not "constitutionally relevant" to defendant's penalty determination. (See *People* v. *Allen, supra*, 42 Cal.3d at p. 1287; *People* v. *Brown, supra*, 40 Cal.3d at p. 540.)

11. *Juror Inquiries During Penalty Phase Deliberations*

After less than three hours of deliberation, the jury foreman presented the court with a note inquiring (1) "what happens if we can't agree?" (2) "can the majority rule on life imprisonment?" and (3) "how long do we deliberate today and what happens if we don't reach a decision by then?" The court responded by rereading CALJIC No. 8.84.2 — as modified at defense counsel's request — which in essence told the jury they had to choose between life imprisonment without parole and death, and that any verdict had to be unanimous. The concluding sentence of the modified instruction read: "In order to make a determination as to penalty, all twelve jurors must agree, *if you can*."

At this point a juror asked: "If we can't, Judge, what happens?" The trial judge replied that he knew what would happen but could not elaborate upon it. Defense counsel requested the court to inquire of the jury whether it would be able to reach a verdict, and the inquiry was posited. One juror responded: "Not the way it is going." The foreman replied: "That is tough, yes." The court then asked the foreman: "Do you think if I allow you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?" The foreman replied: "I believe there is a possibility." Another juror added: "We did need more time." Finally, a different juror asked: "[W]ould this be an either/or situation? ..." — to which the court replied: "It is not that. ... If you can make that either/or decision. If you cannot, then I will discharge you."

Under the 1977 death penalty legislation (former § 190.4 subd. (b)), if a jury was unable to agree on penalty the court would impose a sentence of life without parole.

Under the current death penalty law applicable here, if the jury is unable to agree on penalty the court must impanel a new jury; if the second jury becomes deadlocked, the court in its discretion may impanel a third jury or impose a sentence of life imprisonment without parole. (§ 190.4, subd. (b).)[23]

Defendant argues that the trial court's failure to "forthrightly" answer the juror's inquiry was error. He contends that the only "forthright" reply would have been an instruction in the full-blown language of section 190.4, subdivision (b); i.e., informing the jury of the statutorily mandated procedures and possibility of subsequent retrials in the event of a deadlock.

We conclude that such an instruction under the 1978 death penalty law would have the potential for unduly confusing and misguiding the jury in their proper role and function in the penalty determination process. Penalty phase juries are presently instructed that their proper task is to decide between a sentence of death and life without the possibility of parole. Any further instruction along the lines suggested herein could well serve to lessen or diminish that obligation in the jurors' eyes. (See *People* v. *Kimble* (1988) 44 Cal.3d 480, 511-516 [244 Cal.Rptr. 148, 749 P.2d 803] [1977 death penalty law]; cf. *People* v. *Gainer* (1977) 19 Cal.3d 835, 852 [139 Cal.Rptr. 861, 566 P.2d 997, 97 A.L.R.3d 73] [wherein we held erroneous any instruction which states or implies that a jury's failure to reach a verdict will necessarily require retrial].)[24]

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23. Of course the People may elect to forego a second or third penalty phase retrial and assent to imposition of a sentence of life imprisonment without the possibility of parole.

24. Defendant speculates that without such instruction, a juror may believe that deadlock at the penalty phase will nullify the guilty verdicts returned in the guilt phase. However, in light of the

In any case, the trial judge here responded to the jurors' questions in a commendably forthright fashion. When initially faced with the inquiries, he sought to avoid any confusion or unseen prejudice by rereading the pertinent CALJIC instruction. But thereafter, when one juror asked the very pointed question: "Is it either/or?" [i.e., automatic imposition of one or the other penalty in the event of a deadlock] — the court prudently avoided misinforming and misleading the jury by stating: "If you can make that either/or decision. If you cannot, then I will discharge you." Defendant can claim no prejudice from such a limited disclosure. It bore no resemblance to the often criticized "*Allen*-type instruction" designed to extract a verdict from a deadlocked jury by admonishing the minority jurors to rethink their positions in light of the majority's views. (*Allen* v. *United States* (1896) 164 U.S. 492, 501 [41 L.Ed. 528, 530-531, 17 S.Ct. 154].)

The jurors deliberated an additional one and a half days after receiving reinstruction and the court's responses to their inquiries before reaching their penalty verdict. There was no objection to the rereading of CALJIC No. 8.84.2, nor did trial counsel propose or request any further instructions. No further instructions were required; no prejudice from the court's replies to the jurors' inquiries is shown.

12. *Automatic Motion for Modification of the Death Verdict*

In every case in which a death penalty is returned, the judge must "review the evidence, consider, take into account, and be guided by the aggravating and mitigating

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instructions which explain the bifurcated nature of capital trials and the jury's function at the penalty phase, the possibility of such a mistaken inference being drawn is unlikely.

circumstances ... and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reason for his findings." (§ 190.4, subd. (e).)

Defendant urges three grounds of error in the court's ruling on the automatic motion for modification of sentence. First, he contends that the content of a letter which the trial judge sent to the jurors — after they were discharged but prior to the hearing on the motion — reveals that the court had prejudged the merits of the motion, and could not thereafter render a fair and impartial decision. Second, he argues that the court's "verbatim" adoption of the proposed findings of fact and conclusions of law prepared by the prosecutor reflects a failure to exercise independent judgment in ruling on the motion. Finally, he contends the court improperly found lack of remorse as an aggravating factor in its findings on the motion.

a. The Letter

Several days after the jury returned its penalty verdict and was discharged, the trial judge sent the 12 jurors and 4 alternates a letter in which he praised the manner in which they had approached their task and obligations. He indicated his feeling that they were "a credit to the criminal justice system," and explained: "It was extremely difficult for me to express these thoughts to you upon your discharge. It was an emotional moment; we had spent many hours together and I now feel I must express my gratitude to you." He added: "*Your decision is acceptable and shall be followed* (italics added)." It is this passage which, defendant urges, reveals that the court had prejudged the merits of the automatic motion for

modification of his death sentence.

At the hearing on the motion, defense counsel expressed concern "that what was said in that letter would indicate in any way that the Court had made a decision prior to fully reviewing and hearing everything that was going to be said." The court responded: "Thank you. The statement, [']your decision is acceptable and shall be followed,['] is not indicative of the Court having made up its mind nor is it a statement that would forebear any statements, evidence, testimony that would be offered on behalf of Mr. Belmontes. [¶] *I think the statement was made for therapeutic purpose more than a legal purpose* (italics added)." Counsel did not request the trial judge to recuse himself from hearing the motion. At the conclusion of the hearing the court reaffirmed that it had made an "independent finding" in affirming the jury's verdict of death.

Subsequent to a jury's discharge, it is not improper to thank or praise the jurors for having dutifully served on the jury and conscientiously performed their functions. In a long and complex capital trial such as this was, it is understandable that the court might want to express gratitude to the jurors along these lines. The trial judge's communication to the jurors by letter here was plainly intended to convey such sentiment.

However, at the time the court sent the letter, it had not yet fully performed its own functions and obligations under the mandate of section 190.4, subdivision (e). Judgment and sentence had yet to be imposed. The court's remark in the letter: "Your decision is acceptable and shall be followed," was patently improper. The court must refrain from making any comment indicating that it cannot, or will not, perform its remaining obligations fairly and impartially under the law. Since the jury had

performed its functions and properly been discharged, our concern here is not with the fact that the communication was made to the jurors, but with whether the remark establishes an inference that the court *in fact* had prejudged the merits of the motion, and therefore could not fairly and impartially perform its statutory obligations in ruling thereon.

"It is presumed that official duty has been regularly performed." (Evid. Code, § 664.) "'[I]n the absence of any contrary evidence, we are entitled to presume that the trial court ... properly followed established law.' [Citation]." (*Ross* v. *Superior Court* (1977) 19 Cal.3d 899, 913 [141 Cal.Rptr. 133, 569 P.2d 727].) Considering the improper remark in the context of the letter in which it was made, together with the court's credible explanation that it "was made for therapeutic purpose more than a legal purpose," we conclude defendant has not established that the trial judge ultimately failed to make the "independent determination" respecting the appropriateness of the penalty verdict, as he was obliged to do under section 190.4, subdivision (e). The court's thorough and detailed findings entered in the record reinforce our conclusion.

b. The Findings

Prior to the hearing on the automatic motion, the prosecutor requested permission to submit proposed findings of fact and conclusions of law in opposition to modification of the death sentence. Defense counsel stated: "I have no problem with it," but requested that he too be permitted to do the same. The prosecutor thereafter filed lengthy and detailed proposed findings of facts and conclusions of law. Defense counsel elected to file points and authorities in support of automatic modification of the death sentence. We find nothing

improper in affording both defendant and the People the opportunity to file respective supporting and opposition memoranda in connection with the proceeding. Thoughtfully prepared documents of this type are of great assistance to a trial judge.

It is clear from the record that the court relied extensively on the prosecutor's proposed written findings, incorporating whole portions of them almost verbatim into its own findings in the record. The record likewise reflects that the court did not "rubber stamp" the prosecutor's proposed findings of fact, refusing to subscribe to many of his overly conclusory proposals.

For example, the prosecutor proposed that the court adopt the following findings: "The defendant, while waiting in the victim's home and while talking to her, considered the alternatives available and decided to go through with the burglary, even though the victim was at home. By disabling the victim, he reasoned, the burglary could be completed unimpeded and by killing her, he decided, he would avoid identification as the perpetrator. The defendant knew from his conversations with Vasquez and the victim, that only Vasquez would be suspected. He knew that no one had seen him arrive at the home. He also knew he could hide out in Stockton or Southern California. Therefore, he concluded, the death of Steacy McConnell would eliminate the only person who could link him to the crime, except for his partners in the criminal enterprise, whom he counted on to maintain silence." These proposed "findings of fact" were riddled with *conclusory* inferences of defendant's state of mind; the court quite properly rejected them.

The prosecutor proposed a finding that, upon alighting from the Chevy, Bolanos and Vasquez "were able to hear the beating taking place inside." Although such was a fair

inference to be drawn from the evidence, the court took pains to more accurately paraphrase the trial testimony, finding: "As they were outside they were able to hear the sound of thumping taking place inside, according to Ballanos' [*sic*] testimony." The prosecutor also proposed that the court make a finding that after the crime, while in the car, "[defendant] then stated that he had killed her to silence a witness." The court more accurately found that: "He then stated he had to take out a witness."

Our review of the court's detailed findings in the record convinces us that it fulfilled its statutory obligation to independently review the jury's verdict of death.

c. Lack of Remorse

Defendant argues that the court improperly made a finding that his lack of remorse was an aggravating factor. The prosecutor proposed that the court find: "[T]he defendant expressed no remorse of even the slightest degree pretrial, in his guilt phase testimony, in his penalty phase testimony, nor during his closing remarks to the jury at the penalty phase." The court instead made a finding that: "The defendant did not express any remorse in the guilt phase of his testimony. In his penalty phase, however, he did indicate to some slight degree his concern for the victim." This finding was included in that portion of the overall findings discussing mitigating circumstances. For reasons already explained, we find that both the prosector, in his argument to the jury, and the trial court, in its own findings on the automatic motion for modification of sentence, did no more than suggest the inapplicability or insubstantial evidence of remorse as a *mitigating* factor. (*People* v. *Rodriguez, supra*, 42 Cal.3d at p. 790.)

13. *Proportionality Review*

Defendant urges that we conduct "intercase" proportionality review — i.e., an examination of whether imposition of the death penalty in his case is disproportionate to the penalties imposed on other persons who have committed similar offenses. It is settled that the Eighth Amendment requires no such comparison. (*Pulley* v. *Harris, supra*, 465 U.S. at pp. 51-54 [79 L.Ed.2d at pp. 41-43].)

Defendant urges that principles of *equal protection* require that he — as a capitally sentenced defendant — be afforded comparative sentence review equivalent to that provided for determinately sentenced felons under the "disparate sentence" statute. (§ 1170, subd. (f).) We have recently rejected the identical argument in *People* v. *Allen, supra*, 42 Cal.3d at pages 1286-1287.

Defendant argues that state and federal proscriptions against "cruel and unusual punishment" require that we conduct "intracase" proportionality review — i.e., an examination of whether defendant's death sentence is proportionate to his individual culpability, irrespective of the punishment imposed on others. (E.g., *People* v. *Dillon* (1983) 34 Cal.3d 441, 477-482 [194 Cal.Rptr. 390, 668 P.2d 697]; *People* v. *Lynch* (1972) 8 Cal.3d 410, 423-424 [105 Cal.Rptr. 217, 503 P.2d 921].)

Defendant was convicted on extremely strong evidence that he committed an intentional murder of extraordinary brutality. He bludgeoned McConnell to death with an iron dumbbell bar; the force of the 15 to 20 some-odd blows leaving her with gaping wounds and a cracked skull. Her defensive wounds plainly evidenced a desperate struggle for life at defendant's hands. The murder occurred in the course of a calculated plan to burglarize the victim's

home, to which defendant had gained entry on false pretenses. After the murder, defendant and his accomplices callously fenced the victim's stereo components for $100 — purchasing beer with a portion of the proceeds.

In the penalty phase the jury was fully apprised of all the factors properly bearing upon whether defendant was eligible for, and deserved, the death penalty. There was, of course, defendant's relative youth, evidence that he had a difficult childhood, and evidence that prior to the murder he had to some degree embraced religion and impressed others with his sincerity in this regard. However, "nothing in prior decisions of this court, or of the federal courts, suggests that his punishment is constitutionally disproportionate to 'the offense' or 'the offender.'" (*People* v. *Melton, supra*, 44 Cal.3d at p. 771.)

III. CONCLUSION

We find no prejudicial error, whether viewed singly or cumulatively, at either the guilt or penalty phases of defendant's trial.

The judgment is affirmed.

Lucas, C. J., Mosk, J., Broussard, J., Panelli, J., Arguelles, J., and Kaufman, J., concurred.

Appellant's petition for a rehearing was denied August 18, 1988, and the opinion was modified to read as printed above.

OPPOSITION BRIEF

ORIGINAL

No. 08-1263

ORIGINAL

Supreme Court, U.S.
JUN 15 2009
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT L. AYERS, WARDEN, PETITIONER

v.

FERNANDO BELMONTES, RESPONDENT

On Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

---

MOTION FOR PERMISSION TO PROCEED IN FORMA PAUPERIS

ERIC S. MULTHAUP
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In Forma Pauperis

RECEIVED
JUN 17 2009

No. 08-1263

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT L. AYERS, WARDEN, PETITIONER

v.

FERNANDO BELMONTES, RESPONDENT

On Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

---

MOTION FOR PERMISSION TO PROCEED IN FORMA PAUPERIS

Respondent Fernando Belmontes, through his attorney Eric S. Multhaup, hereby moves for permission to proceed in forma pauperis pursuant to Rule 39, Supreme Court Rules. Respondent sought and obtained permission to proceed in forma pauperis in the United States District Court for the Eastern District of California, and in the Ninth Circuit Court of Appeals.

Both the district court and the Ninth Circuit appointed attorney Eric S. Multhaup to represent respondent in the proceedings in those courts, pursuant to the Criminal Justice Act of 1964, 18 U.S.C. section 3006A.

Respondent Belmontes was previously granted permission to proceed in forma pauperis by this Court in No. 03-1503, Brown v. Belmontes, , and in No. 05-493, Ornaski v. Belmontes, both arising from the same California judgment.

CONCLUSION

Wherefore, for the foregoing reasons, respondent respectfully requests that this Court grant permission to proceed in forma pauperis in this case.

Dated: June 15, 2009

Respectfully submitted,

ERIC MULTHAUP, Attorney for
Respondent FERNANDO BELMONTES

DECLARATION OF SERVICE

RE: Robert L. Ayers, Warden vs. Fernando Belmontes

I, Eric S. Multhaup, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 20 Sunnyside Avenue, Suite A, Mill Valley, California 94941. I served the attached:

MOTION FOR PERMISSION TO PROCEED IN FORMA PAUPERIS

on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepared, in the United States mail at Mill Valley, California, addressed as follows:

Attorney General
Attn: Mark Johnson, Esq.
P. O. Box 944255
Sacramento, CA 94244-2550

I declare under penalty of perjury that service was effected on June 15, 2009 at Mill Valley, California and that this declaration was executed on June 15, 2009 at Mill Valley, California.

ERIC S. MULTHAUP

No. 08-1263

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT L. AYERS, WARDEN, PETITIONER

v.

FERNANDO BELMONTES, RESPONDENT

On Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ERIC S. MULTHAUP
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415-821-6000
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No. 08-1263

IN THE SUPREME COURT OF THE UNITED STATES

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FERNANDO BELMONTES, RESPONDENT

On Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HON. JOHN G. ROBERTS, JR., CHIEF JUSTICE, AND TO THE HON. ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondent Fernando Belmontes, Jr. opposes the Petition for Writ of Certiorari as follows.

Petitioner's "Question Presented" reflects a contrived effort to recharacterize the panel majority's entirely unremarkable finding of deficient performance – trial counsel's failure to conduct any investigation into mental

state mitigation evidence – as the imposition of an unheard of and far-fetched duty on defense counsel on capital cases.

Petitioner's "Question Presented" is framed solely in terms of the deficient performance prong of the Sixth Amendment test of Strickland v. Washington, 466 U.S. 668 (1984). However, the actual deficient performance as found by the District Court and affirmed by the panel majority has nothing to do with any "alternative theory" that is "inconsistent with his client's testimony," or that "would likely open the door to previously excluded evidence..." Rather, the actual deficient performance finding was based on the uncontested failure of trial counsel to conduct any type of penalty phase investigation regarding possible mental state mitigation evidence. The section 2254 record fully supports the panel majority's finding, summarized as follows:

> Although [trial counsel] hired a psychiatrist, Dr. Cavanaugh, to evaluate Belmontes' mental state for purposes of the guilt phase, he did not ask Cavanaugh to comment on any issues relevant to the penalty phase, and did not consult any psychologists or psychiatrists with respect to any possible mental defect, impairment, or condition that might be relevant to sentencing as opposed to guilt... [trial counsel] repeatedly testified that he had no strategy reason for failing to consult with Dr. Cavanaugh or any other psychiatrist or psychologist about the import of such mitigating evidence or its relationship to Belmontes' subsequent behavior. Appendix to Petition, p. 30a (emphasis supplied).

The deficient performance component of this case is solely about a complete failure to conduct any mental state mitigation inquiry, notwithstanding numerous indicia that mental state mitigating evidence likely existed. The panel majority correctly notes that "[t]he district court held that [trial counsel's] performance was deficient and that dissent does not dispute this holding." Pet. App. 44a, fn. 9 (emphasis supplied).

Thus, the panel majority issued a nuts-and-bolts determination of deficient performance that neither the dissenting panel member nor the dissenting en banc judges disputed. Under these circumstances, petitioner's effort to impute to the Ninth Circuit the imposition of a duty to present some kind of "alternate theory" that is "inconsistent with his client's testimony" is a contrived effort to elicit a grant of certiorari based on a characterization of the panel decision that is not supported by the record.

The debates between the panel majority and the dissenting member and between the en banc factions related solely to the prejudice prong of Strickland. Dissenting Judge O'Scannlain wrote, "[t]he majority concludes that Belmontes has showed both deficiency and prejudice, but its analysis deprives the prejudice requirement of any meaning." Pet. App. 90a (emphasis supplied). Judge O'Scannlain did not clearly dispute the deficient performance finding.

Similarly, the en banc dissent written by Judge Callahan rests on the assertion that "Counsel's failure to explore the mitigating evidence was not prejudicial," Pet App. 123a, not that counsel's performance was adequate.

Petitioner has adopted the highly anomalous position of asking this Court to grant certiorari regarding the deficient performance prong of Strickland, on which there was no dispute as to either the appropriate standard or its application to the facts of this case by any federal judge who has considered the issue. Petitioner's contention that the panel majority has tampered with the Strickland standard of deficient performance, like the Seventh Circuit in Wright v. Van Patten, 552 U.S. 120 (2008), is belied by the complete absence of any comparable contention by any of the dissenting judges. Clearly, if any of the dissenting judges had viewed the panel majority's deficient performance finding as incompatible with Strickland, they would have at least noted that in their dissents.

Petitioner has presumably not focused on the prejudice dispute as a basis for seeking certiorari, because there was no dispute among the Ninth Circuit judges as to the standard to be applied. The only actual dispute related to the application of the standard to the specific facts contained in this record. Petitioner must recognize, at least implicitly, that a dispute among Court of

Appeal judges as to the correct application of the familiar Strickland prejudice standard to the specific and idiosyncratic facts of a particular case is not a cert.-worthy subject. As Justice Scalia admonished the state during oral argument in Knowles v. Mirzayance, ___ U.S. ___, 129 S.Ct. 1411 (2009), the court "did not take the case for that (harmless error analysis)" because "it wouldn't be very helpful to bar" if the Court decided that case on the basis of prejudice. Oral Arg. TX, p. 13.

Moreover, petitioner's claim that the Ninth Circuit imposed a rogue duty on defense counsel to present an "alternative" theory that is "inconsistent" with the defendant's position is itself unsupported by the record. Petitioner asserts, incorrectly, that the majority panel "held that Shick had rendered ineffective assistance in failing to present penalty-phase evidence in support of an alternative theory, different from the one presented by defense counsel, that hardships in respondent's youth had psychologically led him to criminality." Pet., p. 2. Petitioner further asserted that the majority opinion "required counsel to present that additional defense theory despite the fact that it contradicted respondent's personal plea to the jurors that he did not want to treat his past as an excuse for his crime." Ibid. This purported contradiction is illusory. In fact, trial counsel did present considerable testimony from lay witnesses as to what

has been characterized by the dissenting panel member as a "wretched childhood," Pet. App. 135a, in a manner not at all inconsistent with Belmontes' allocution. If there was no inconsistency between trial counsel's presentation regarding the wretched childhood and petitioner's acceptance of responsibility during his allocution for his adult acts, notwithstanding those childhood influences, there would not be any untoward inconsistency between the presentation of complementary evidence of mental state factors from petitioner's youth to build upon the foundation presented by the lay witnesses.

Counsel for petitioner may be attempting to evoke an analogy to Schriro v. Landrigan, 550 U.S. 465 (2007), but that reference fails entirely because the record in this case is clear that Belmontes never placed any limitation on trial counsel as far as developing and presenting mitigating evidence.

Wherefore, for the foregoing reasons, respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Dated: June 15, 2009

Respectfully submitted,

ERIC S. MULTHAUP, Attorney for
FERNANDO BELMONTES

DECLARATION OF SERVICE

RE: Ayers vs. Fernando Belmontes
No. 08-1263

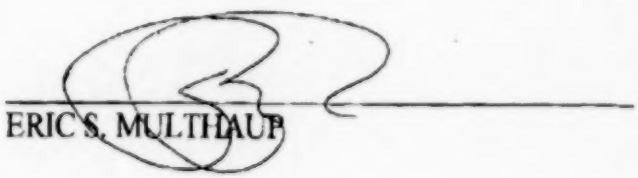
I, Eric S. Multhaup, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 20 Sunnyside Avenue, Suite A, Mill Valley, California 94941. I served the attached:

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepared, in the United States mail at Mill Valley, California, addressed as follows:

Attorney General
Attn: Mark A. Johnson, Esq.
1300 I Street
Sacramento, CA 95814

I declare under penalty of perjury that service was effected on June 15, 2009 at Mill Valley, California and that this declaration was executed on June 15, 2009 at Mill Valley, California.



ERIC S. MULTHAUP

REPLY BRIEF

67166

(2)

No. 08-1263

FILED
JUN 25 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

ROBERT WONG, WARDEN FOR THE CALIFORNIA STATE PRISON AT SAN QUENTIN, *Petitioner*,

v.

FERNANDO BELMONTES, JR., *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Wong, Warden, California State Prison at San Quentin, by and through his attorneys, hereby replies to Respondent Fernando Belmontes' Opposition to the Petition for Writ of Certiorari as follows:

In opposing the certiorari petition, Belmontes accuses the State of a "contrived effort to recharacterize" the panel majority's finding of ineffective assistance of counsel. (Opp. 1.) He insists that the panel majority's opinion has nothing to do with trial counsel's failure to present evidence supporting an alternative defense theory at the penalty trial but instead rests entirely on the "unremarkable finding" that counsel had failed to investigate possible "mental state mitigation evidence." (Opp. 1-3.)

But the majority's decision does not rest on counsel's alleged failure to investigate Belmontes' "mental state." Belmontes ignores the panel's unrelenting criticism that trial counsel should have presented additional evidence to support a theory that, despite Belmontes' difficult childhood, he had been well adjusted until a brief period of adolescent illness and isolation led him to drug abuse and ultimately to violent criminal conduct. Counsel's "failure" to present that defense theory is the only reason advanced by the panel majority as to how Belmontes might have been prejudiced. Belmontes in his opposition brief does not now explain how any additional "mental state investigation" might have been helpful unless it was used to support the panel majority's newfound penalty-phase theory that the circumstances of Belmontes' background somehow

explained his transformation into the person responsible for Steacy McConnell's brutal murder.

More important, Belmontes conspicuously omits any discussion of the crippling consequences that likely would have resulted from presenting such "mental state" evidence. As explained in the State's certiorari petition, and as the panel majority in effect acknowledged, the theory that Belmontes' background had led him to become a violent criminal could not have been presented effectively, if at all, without the aid of expert witnesses; and presenting such expert testimony likely would have resulted in the jury learning of devastating information about Belmontes past—most seriously, his personal responsibility for the execution-style murder of Jerry Howard.[1/] As demonstrated in the certiorari petition, the trial judge here had expressly ruled that *any questioning* about Belmontes' character for violence would open the door to the Howard murder.

In another apparent attempt to sidestep the risk the Howard murder posed to the defense's penalty-phase case, Belmontes argues that the State is somehow precluded from objecting to the panel majority's finding that defense counsel Schick's performance was incompetent. This is so, according

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1. As noted in the State's certiorari petition, Belmontes' asserted grounds supporting his claim of ineffective assistance of counsel differed significantly from those set forth in the panel majority's most recent opinion. In Belmontes' various briefs in the Ninth Circuit, he claimed only that experts should have been presented to opine that his crime was a mere aberration from his otherwise good character and that, based on the particular makeup of his allegedly good character, he was likely to adjust well to a life in prison. The State argued that expert opinion testimony on these matters likewise would have opened the door to evidence of the Howard murder and other instances of Belmontes' violent conduct.

to Belmontes, because none of the dissenting circuit judges expressly refuted the majority's finding of incompetence but instead found that Belmontes was not prejudiced. But Belmontes' interpretation of the dissenting opinions cannot be squared with logic. In their dissenting opinions, Judges O'Scannlain and Callahan both emphasized that any attempt to introduce the alleged mitigating evidence cited by the majority would have jeopardized Schick's successful exclusion of evidence of the Howard murder. In other words, the dissenting judges' conclusion that Belmontes was not prejudiced was premised on Schick's success in shielding the jury from information about the Howard murder that would have devastated Belmontes' defense. Just as the panel majority's opinion cannot be defended on simple grounds of alleged "failure to investigate," the dissenting opinions cannot logically be minimized as resting on a simple finding of no "prejudice." This case implicates both prongs of *Strickland* v. *Washington*, 466 U.S. 668 (1984), because the reasons why Schick's representation was reasonable and the reasons why Belmontes was not prejudiced are the same.

It is nonsensical to conclude, as the panel majority necessarily did, that a defense lawyer may be condemned as ineffective for failing to present additional evidence that bore the serious risk of backfiring terribly. See *Burger* v. *Kemp*, 483 U.S. 776, 794 (1987). Belmontes' attempt to portray this case as one involving a simple disagreement among circuit judges regarding the proper application of *Strickland* to a given set of facts cannot mask the majority's dangerous interpretation of the fundamental *Strickland* standard to produce such an anomalous result. As expressed in Judge Callahan's

dissenting opinion, eight judges of the Ninth Circuit rightly fear that the panel majority's decision "has created a standard for effective assistance of counsel in death penalty cases that, in effect, guarantees a defendant a second penalty stage trial." (App. 123a.)

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: June 25, 2009

Respectfully submitted

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
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Deputy Attorney General

Counsel of Record
Counsel for Petitioner

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No. 08-1263

In the Supreme Court of the United States

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v.

FERNANDO BELMONTES, JR., *Respondent*.

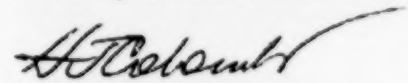
CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Reply to Opposition to Petition for Writ of Certiorari contains 733 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 25, 2009
Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California



HARRY J. COLOMBO
Deputy Attorney General

Counsel of Record
Counsel for Petitioner

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No. 08-1263

In the Supreme Court of the United States

ROBERT WONG, WARDEN FOR THE CALIFORNIA STATE PRISON AT SAN QUENTIN, *Petitioner*,

v.

FERNANDO BELMONTES, JR., *Respondent*.

CERTIFICATE OF SERVICE BY MAIL

I, Ward Campbell, Counsel for Petitioner, a member of the Bar of this Court hereby certify that on **June 25, 2009**, three copies of the **Reply to Opposition to Petition for writ of Certiorari** in the above-entitled case were mailed, first class postage prepaid to:

Eric S. Multhaup
Attorney at Law
20 Sunnyside Avenue, Suite A
Mill Valley, CA 94941

Christopher H. Wing
Attorney at Law
1101 E Street
Sacramento, CA 95814-0818

I further certify that all parties required to be served have been served.

WARD CAMPBELL, Deputy Attorney General
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Counsel for Petitioner

SA2009309268
Document in ProLaw